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AN EXAMINATION OF PROPOSED ENVIRONMENTAL REGULATION'S IMPACTS ON AMERICA'S SMALL BUSINESSES

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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AN EXAMINATION OF PROPOSED ENVIRONMENTAL REGULATION'S IMPACTS ON AMERICA'S SMALL BUSINESSES

TUESDAY, MAY 19, 2015

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 2:02 p.m., in Room 428A, Russell Senate Office Building, Hon. David Vitter, Chairman of the Committee, presiding.

Present: Senators Vitter, Fischer, Gardner, Ernst, Ayotte, Shaheen, Markey, and Booker.

OPENING STATEMENT OF HON. DAVID VITTER, CHAIRMAN, AND A U.S. SENATOR FROM LOUISIANA

Chairman VITTER. Good afternoon, everyone, and we will call the committee to order.

Welcome to the Senate Committee on Small Business and Entrepreneurship's hearing assessing the economic and regulatory impacts of the EPA and the Army Corps of Engineers' proposed rule to redefine the term "waters of the United States," which will be finalized in the near future.

The purpose of this hearing is to examine the impact that the proposal will have on small businesses as well as the agencies' egregious circumvention of the very regulatory process set in place to protect small businesses. Specifically, the EPA and the Corps have publicly concluded that the proposed rule will not have any significant impact on a substantial number of small entities, and they also concluded that the proposal will have no direct impacts on small entities.

Now, I think this is flat out outrageous, that the administration would pretend that the proposal would not have a substantial and a direct impact on small businesses. It is so outrageous, in fact, that I will soon introduce a Sense of the Senate Resolution condemning the administration's circumvention of this important process and will hold a vote on that resolution in this committee.

Regarding the content of the rule, the sweeping language in the proposal represents a direct threat to private property rights. By expanding the types and numbers of water bodies subject to federal control, these agencies will further expand their authority enormously to tell home owners, small businesses, and others what they can do on their own property.

This provides an opening for the federal government to increase its role yet again, and dramatically, in local land use planning and decisions. State and local zoning commissions will see their rules displaced by Washington bureaucrats who do not truly understand the implications of the policy changes they will be pushing forward with. This will lead to costly litigation and expand the ability of radical environmental groups to sue land owners over how they manage and use their own property. Additionally, the rule as proposed will have a significant negative impact on agriculture, and particularly smaller family farms.

On October 1, 2014, the Office of Advocacy, an independent office of the SBA, sent a letter to the EPA and the Army Corps that was highly critical of their finding that the proposal will not have any significant impact on a substantial number of small entities. The Office of Advocacy's role is to represent small entities in the federal rulemaking process. In fiscal year 2014, it achieved regulatory cost savings to small businesses of more than $4.8 billion. A substantial part of these savings—in fact, the great majority, $4.6 billion—arose from changes to proposed EPA regulations.

In its October letter, Advocacy unequivocally stated, and I quote, "Advocacy believes that EPA and the Corps have improperly certified the proposed rule under the Regulatory Flexibility Act because it would have direct significant effects on small businesses. Advocacy recommends that the agencies withdraw the rule and that the EPA conduct a Small Business Advocacy Review Panel before proceeding any further with this rulemaking," close quote. As we know, EPA has completely ignored that input.

Under the Regulatory Flexibility Act, when an agency finds that a proposed rule will have a significant economic impact on a substantial number of small entities, it must evaluate the impact, consider alternatives, and in the case of EPA, convene a Small Business Advocacy Review Panel to consider the input of the Office of Advocacy and the small business community. But, by certifying that the rule will not have that impact, which is clearly just not the case, the EPA and the Corps effectively shut down this process mandated by law.

As Chair of the Small Business Committee, I am committed to ensuring that we do not allow that sort of action to proceed unchecked. That is why we are having this hearing. That is why we are going to have this resolution, which I will be introducing soon and certainly hope can gain bipartisan support in this committee and in the Senate overall.

Now, I turn to our distinguished Ranking Member, Senator Shaheen, for her opening comments.

OPENING STATEMENT OF HON. JEANNE SHAHEEN, RANKING MEMBER, A U.S. SENATOR FROM NEW HAMPSHIRE

Senator SHAHEEN. Thank you, Mr. Chairman.

Good afternoon, everyone. Welcome to today's hearing. I want to begin by thanking both panels who are here to testify.

As the Chairman noted, today, we are discussing the impact of environmental regulations on small business, and specifically, we are going to focus on the joint efforts by the Environmental Protection Agency and the Corps of Engineers to amend their definition

of Waters of the United States. This term is integral to clarifying which bodies of water will be covered under the Clean Water Act.

I am pleased that on our first panel, we will have Mr. Maresca, who is the Director of Interagency Affairs with the Office of Advocacy of the Small Business Administration, testifying. You will bring an important voice to this afternoon's hearing, given the role the Office of Advocacy has representing the interests of small businesses in the federal rulemaking process.

In addition, I think it is beneficial that our second panel will provide small business perspectives across a variety of diverse industries, including agriculture, home building, and outdoor recreation.

I am disappointed that we do not have officials from the two relevant federal agencies who are charged with promulgating this rule joining us today. I believe that in order for there to be a meaningful and constructive conversation about the proposed rule's impact on small businesses, we need to have all parties who are part of this rulemaking process participating in the discussion.

I hope that today's hearing is not about attacking the Clean Water Act or obstructing the efforts of the federal government to make regulatory decisions. This hearing should focus on whether the agencies responsible for promulgating this rule, the Environmental Protection Agency and the U.S. Army Corps of Engineers, complied with their statutory requirements to ensure that small businesses are considered in the rulemaking process.

As we all know, the EPA and the Corps of Engineers determined that the rule would not have a significant impact on small businesses, and I am disappointed that they are not here to answer questions and tell us how they arrived at their conclusions.

It is my sincere hope that moving forward this Committee can work together in a bipartisan manner to effectively communicate the interests of small businesses with federal agencies charged with crafting federal regulations.

So, thank you, Mr. Chairman, and I look forward to hearing from today's witnesses.

Chairman VITTER. Thank you very much, Senator Shaheen.

And, just for the record, let me point out that we would have welcomed the EPA and the Corps to be here, and it is my understanding that the Minority staff reached out to them about that and were basically told that they were not going to be coming. So, that underscores, I think, the frustration of many of us with their decision and with the tone and the attitude they have taken in making this certification, which I think—I am just speaking for myself—is just flat out contrary to a whole, whole lot of evidence.

Okay. At this point, I would like to introduce our first witness, Charles Maresca, Director of Interagency Affairs at the Small Business Administration's Office of Advocacy. Mr. Maresca will be the lone witness on the federal panel because of what I just said. He leads Advocacy's efforts to monitor federal agencies' compliance with the Regulatory Flexibility Act, and, of course, that is what we are talking about with regard to this proposed waters of the United States rule today.

Welcome, Mr. Maresca.

STATEMENT OF CHARLES MARESCA, DIRECTOR OF INTERAGENCY AFFAIRS, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. MARESCA. Thank you, Chairman Vitter, Ranking Member Shaheen, members of the committee. I am honored to be here this afternoon to present testimony to you on behalf of the Office of Advocacy of the U.S. Small Business Administration regarding the Environmental Protection Agency and the Army Corps of Engineers' proposed rule on the definition of waters of the United States under the Clean Water Act.

Advocacy is an independent office within the SBA that speaks on behalf of the small business community before federal agencies, Congress, and the White House. The views in my testimony do not necessarily reflect the views of the administration or the SBA and this statement has not been circulated to the Office of Management and Budget for clearance.

And, I ask that my complete testimony be entered into the record. It includes a detailed background on Advocacy's work with this proposed rule, but I will just summarize my thoughts in these remarks.

Chairman VITTER. Without objection, that will be entered into the record.

Mr. MARESCA. As Director of Interagency Affairs in the SBA Office of Advocacy, I manage a team of attorneys that works with the federal government agencies during the rulemaking process to reduce the regulatory burdens on small businesses and oversee the requirements of the Regulatory Flexibility Act. The RFA requires federal agencies to consider the effects of their proposed rules on small businesses and other small entities, including small government jurisdictions and small nonprofits.

The Clean Water Act was enacted in 1972 to restore and maintain the integrity of the nation's waters. The Act requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a water of the United States. The courts have left much uncertainty regarding what constitutes a water of the United States. This uncertainty makes it difficult for small entities to know which waters are subject to Clean Water Act jurisdiction and permitting.

To address this uncertainty, the EPA and the Corps have proposed a rule which would revise the regulatory definition of waters of the United States and would apply to all sections of the Clean Water Act. Advocacy has been engaged with EPA, the Corps, and small entities on this issue from its inception, including holding roundtable discussions in Washington, D.C., and Los Angeles, California, in July and August of 2014. In addition, the Office participated in two small entity meetings held by EPA and the Corps in 2011 and 2014.

Advocacy has met with and spoken to numerous individuals, small entities concerned about the effects of this rule over the last four years. These small entities represent many different industries, including but not limited to agriculture, real estate, home builders, cattlemen, farmers, and the mining industry. Feedback from these small entities has remained consistent. Small businesses believe that the rule as proposed by EPA and the Corps is

an expansion of jurisdiction and will increase costs to small businesses.

On October 1, 2014, the Office of Advocacy sent a letter to EPA and the Corps expressing our concerns with their RFA compliance. Advocacy believes, first, the rule will impose direct costs on small businesses. Second, these costs will have a significant economic impact on those small businesses. And, third, the agencies incorrectly certified the rule and should have conducted a SBREFA panel.

In conclusion, Advocacy and small businesses are concerned about the rule as proposed. The rule will have a direct and potential costly impact on small businesses. Advocacy has advised the agencies to withdraw the rule and conduct the SBREFA panel prior to promulgating any final rule on this issue.

I would be happy to answer any questions you might have. Thank you.

[The prepared statement of Mr. Maresca follows:]

Advocacy: the voice of small business in government

Testimony of
Charles Maresca
Director of Interagency Affairs
Office of Advocacy
U.S. Small Business Administration

United States Senate Committee on Small Business and Entrepreneurship

Date: May 19, 2015
Time: 2:00 PM
Location: 428A Russell Senate Office Building
Topic: An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses

Charles Maresca
Director of Interagency Affairs
SBA Office of Advocacy

Chairman Vitter, Ranking Member Shaheen, Members of the Committee, I am honored to be here today to present testimony to you on behalf of the Office of Advocacy (Advocacy) of the U. S. Small Business Administration (SBA) about the Environmental Protection Agency (EPA) and the Army Corps of Engineer's (the Corps) proposed rule on the definition of "Waters of the United States" under the Clean Water Act[1].

As Director of Interagency Affairs, I manage a team of attorneys that works with federal government agencies during the rulemaking process to reduce regulatory burdens on small businesses and implements the requirements of the Regulatory Flexibility Act (RFA). The RFA requires federal agencies to consider the effects of their proposed rules on small businesses and other small entities, including small jurisdictions and small nonprofits. The Office of Advocacy is an independent office within the SBA that speaks on behalf of the small-business community before federal agencies, Congress, and the White House. The views in my testimony do not necessarily reflect the views of the Administration or the SBA, and this statement has not been circulated to the Office of Management and Budget for clearance.

Background on the Clean Water Act

The Clean Water Act (CWA) was enacted in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[1] The CWA accomplishes this by eliminating the "discharge of pollutants into the navigable waters."[2] The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas."[3] Existing regulations currently define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.[4]

The CWA requires a permit in order to discharge pollutants, dredged, or fill materials into any body of water deemed to be a "water of the United States."[5] The EPA generally administers these permits; however, EPA and the Corps jointly administer and enforce certain permit programs under the Act.[6]

The extent of the Act's jurisdiction has been the subject of much litigation and regulatory action, including three Supreme Court decisions. Actions of the Court have expanded and contracted the definition, especially regarding wetlands and smaller bodies of water.

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[1] 33 U.S.C. § 1251(a) (1972).
[2] Id. at § 1251(a)(1).
[3] Id. at § 1362(7).
[4] 33 C.F.R. § 328.3(a); 40 C.F.R. §230.3(s).
[5] 33 U.S.C. §§ 1311(a), 1342, 1344.
[6] Id. at § 1344.

The courts have left much uncertainty regarding what constitutes a "water of the United States." Such uncertainty has made it difficult for small entities to know which waters are subject to CWA jurisdiction and permitting.

To address this uncertainty, the EPA and the Corps proposed this rule which would revise the regulatory definition of "waters of the United States" and would apply to all sections of the Clean Water Act. The proposed rule defines "waters of the United States" within the framework of the CWA as the following seven categories:

- All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- All interstate waters, including interstate wetlands;
- The territorial seas;
- All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;
- All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;
- All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and
- On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.[7]

Advocacy Involvement

For several years EPA and the Corps have been working on a proposal, first as a guidance document and subsequently a published rule, that would clarify the CWA's jurisdiction; that is to say when water would be deemed a water of the U.S. for purposes of the CWA. Advocacy has been engaged with EPA, the Corps, and small entities on this issue from its inception, including holding roundtable discussions in Washington, DC and Los, Angeles, CA in July and August of 2014 respectively. In addition, the office participated in two small entity meetings held by EPA and the Corps in 2011 and 2014. Advocacy has met with and spoken to numerous individual small entities concerned about the effects of this rule over the last four years. These small entities represent many different industries including but not limited to agriculture, real estate, home builders, cattlemen, farmers, and the mining industries. Feedback from these small entities has remained consistent: the proposed rule as promulgated by EPA and the Corps is an expansion of jurisdiction that will increase the costs to small businesses.

[7] 79 *Fed. Reg.* at 22,198.

The Agencies Should Have Conducted a SBREFA Panel

Under Section 609(b) of the RFA, EPA is required to conduct Small Business Regulatory Enforcement Act panels (SBREFA panels) when it is unable to certify that a rule will not have a significant economic impact on a substantial number of small businesses.[8] SBREFA panels give small entity representatives (SERs) a chance to understand an upcoming proposed rule and provide meaningful input to help the agency comply with the RFA. SERs help the panel understand the ramifications of the proposed rule and significant alternatives to it.

The EPA and the Corps have certified that the proposed rule will not have a significant economic impact on a substantial number of small businesses. They argue that the proposed rule does not expand jurisdiction but rather narrows jurisdiction of the CWA as compared to current regulation.[9] As a result, the agencies argue, the proposed rule will not affect small entities to a greater degree than the existing regulations.[10]

Advocacy believes that the agencies are incorrect in relying upon the existing regulations, which have been abrogated by the Supreme Court in two separate opinions and are not currently used as the basis for making jurisdictional determinations.

Advocacy believes that the proper baseline from which to assess the rule's economic impact is the guidance document issued in 2008 which is currently used as the basis for making jurisdictional determinations. Guidance from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) substantiates this view. OIRA's Circular A-4 provides guidance to federal agencies on the development of regulatory analysis.[11] It states that "The baseline should be the best assessment of the way the world would look absent the proposed action."[12] The Corps and EPA issued the guidance document in 2008 which sought to bring jurisdictional determinations in line with the Supreme Court decisions concerning CWA jurisdiction.[13] It is this guidance document that serves as the current basis for making jurisdictional determinations, not the 1986 regulation. Using an obsolete baseline diminishes the effects of this rule.

The Rule Will Have a Significant Economic Impact on Small Businesses

The small entities that Advocacy has spoken with have indicated that the rule will impose significant costs. Advocacy notes that the economic analysis for the proposed rule

[8] 5 U.S.C. § 609 (b).
[9] Definition of Waters of the United States Under the Clean Water Act, 79 *Fed. Reg.* 22188 (April 21, 2014).
[10] Id.
[11] Office of Management and Budget, *Circular A-4*, http://www.whitehouse.gov/omb/circulars_a004_a-4/#e (September 17, 2003).
[12] Id.
[13] Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008, http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm .

confirms that it may result in an increase in jurisdiction that will lead to greater costs stating, "A change in assertion of CWA jurisdiction could result in indirect costs of implementation of the CWA 404 program: a greater share of development projects would intersect with jurisdictional waters, thus requiring the sponsors of those additional projects to obtain and comply with CWA 404 permits."[14]

An example of the potential costs actually comes directly from the economic analysis that accompanied the proposed rule. The EPA and the Corps estimate that CWA 404 permit costs would increase between $19.8 million and $52.0 million dollars annually, and they estimate that section 404 mitigation costs would rise between $59.7 million and $113.5 million annually.[15] The analysis further states that the amounts discussed do not reflect additional possible costs such as the increases associated with as Section 402 permitting or Section 311 oil spill prevention plans, and the analysis is not representative of the changes that may occur with respect to Section 402 and Section 311 permitting.[16] Thus, the agency states that there will be costs that are not accounted for in the economic analysis but leaves small entities without a clear idea of the additional costs they are likely to incur for these Clean Water Act programs.

Small entities have provided anecdotal evidence of how this proposed rule may impose significant economic costs. For example, small entities in the utility industry have expressed that this proposed rule could eliminate the advantages of Nationwide Permit 12 – Utility Line Projects (NWP 12). Utility companies use NWP 12 to construct and maintain roads that provide access to the utility grid. Under NWP 12 a "single and complete" project that results in less than a half-acre loss of waters of the U.S. is allowed to proceed under NWP 12 rather than obtain an individual CWA permit.[17] Currently, each crossing of a road over a water of the U.S. is treated as a "single and complete" project. The proposed rule creates large areas in which NWP 12 may not be able to be used at all. Under this proposed rule, waters in the same riparian area and floodplain become adjacent waters and therefore waters of the U.S. If all of the waters in the riparian area and floodplain are treated as one interconnected water of the U.S., it would be virtually impossible for small utility companies to use NWP 12. Small utilities would need to apply for the more costly and time consuming individual permits. This is a direct cost imposed solely as a result of the changes to the definition of the term "waters of the United States" proposed in this rule.

The Rule Imposes Direct Costs on Small Entities

Moreover, small entities disagree with the agencies' contention that the costs of this rule would be indirect, therefore putting these costs beyond the scope of the RFA.

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[14] Economic Analysis of Proposed Revised Definition of Waters of the United States, U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, 13 (March 2014). Advocacy disagrees with the agencies' assertion that this cost is indirect (see above).
[15] Id. at 16.
[16] Id. At 12.
[17] Reissuance of Nationwide Permits, 77 Fed. Reg. 10195 (February 21, 2012).

The courts have ruled that the RFA requires analysis of direct cost effects only. Under the RFA, agencies are not required to analyze indirect effects to small entities, and where all effects on small entities are indirect certification may be appropriate.

The agencies base certification upon two cases which generally hold that agencies may certify when all the effects of a rule would be indirect *Mid-Tex Electric Cooperative, Inc., v. Federal Energy Regulatory Commission*[18] and *American Trucking Associations, Inc., v. EPA*[19]. These cases discuss the circumstances under which the effects of a rule may be found to be indirect.

In *Mid-Tex*,[20] the Federal Energy Regulatory Commission (FERC) issued regulations instructing generating utilities how to include costs of construction work in their rates. The issue raised in this case was whether or not the agency had improperly certified the rule because it failed to consider the impact on the small business customers of those utilities. The court concluded that certification was appropriate because any costs borne by the customers of the utility companies would be indirect.

In *Mid-Tex,* the generating utilities were the entities regulated and bound by FERC guidelines, and it was not certain that they would pass on the costs of the new guidelines to their small business customers. In the current case, the Clean Water Act and the revised definition proposed in this rule directly determine permitting requirements and other obligations. It is unquestionable that small businesses will continue to seek permits under the Clean Water Act. As a result, they will be subject to the application of the proposed definition and the impacts arising from its application.

In *American Trucking*,[21] the EPA's certification of rules to establish a primary national ambient air quality standard (NAAQS) for ozone was challenged. By statue, the rules *required* EPA to approve any state plan that met the standards; EPA could not reject a plan based upon its view of the wisdom of a state's choices.[22] Under these circumstances, the court concluded that EPA had properly certified because any impacts to small entities would flow from the individual states' actions and thus be indirect.[23]

Contrary to *American Trucking*, the WOTUS rule defines the scope of jurisdiction of the Clean Water Act and does not leave implementary discretion to any entity or intermediary. The rule does not, for example, set a goal for which types or how many waters must be included in a jurisdiction, then leaves the Corps or states to determine the exact definition of waters of the United States to be applied in particular instances. This rule establishes the definition and all small entities are bound by it.

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[18] *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission (FERC),* 773 F.2d 327, 342 (D.C. Cir. 1985).
[19] *American Trucking Associations v. EPA,* 175 F.3d 1027 (D.C. Cir. 1999).
[20] 773 F.2d at 342.
[21] 175 F.3d 1027 (D.C. Cir. 1999).
[22] Id. at 1044.
[23] Id. at 1045.

Conclusion

Advocacy and small businesses are extremely concerned about the rule as proposed. The rule will have a direct and potentially costly impact on small businesses. The limited economic analysis that the agencies submitted with the rule provides ample evidence of a potentially significant economic impact. We believe that the agencies' certification of no small business impact is inappropriate in light of this information. Advocacy also has significant reservations about the agencies' determination that this rule only has indirect effects on small businesses. Advocacy has advised the agencies to withdraw the rule and conduct a SBREFA panel prior to promulgating any final rule on this issue.

Chairman VITTER. Thank you very much, and we will start those questions.

Mr. Maresca, you stated in your testimony that EPA and the Corps should have certified that the proposal will have that significant economic impact on a substantial number of small business entities and, therefore, they should have convened an SBAR panel. Can you please explain how that panel process helps protect the interests of small businesses?

Mr. MARESCA. Yes, Senator. The requirement of a panel that is in the RFA for EPA requires that they convene a meeting with small entity representatives. The panel consists of—would consist of EPA, Advocacy, and OMB. We would hear—they would present to those small entities any data that they had collected in support of the rule that they were proposing and they would suggest to the small entity representatives a number of regulatory alternatives, including a preferred option, in most cases, and the small entity representatives would have been given an opportunity to comment on all of those alternatives and to suggest ways that the rule could be—could mitigate the costs.

Chairman VITTER. So, just to clarify and make sure I understand, it is significant in at least two senses. Number one, the agencies would have to present their factual evidence and basis for this rulemaking, proposed rulemaking. And, number two, they would have to present alternatives, correct?

Mr. MARESCA. That is correct. That is the point of the SBREFA panels.

Chairman VITTER. Okay. Your testimony also states that the agencies incorrectly used a standard from 1986, a standard that has been abrogated by the U.S. Supreme Court, to find that the rule will not expand the jurisdiction of the Clean Water Act and, therefore, not affect small businesses. However, in their economic analysis, the EPA and the Corps used the more recent and correct standard to show that the rule could expand the jurisdiction of the Clean Water Act. It seems like they are trying to have it both ways and use whatever standard is convenient at the time. Can you provide some additional detail on how the use of an incorrect baseline obscures what the real impacts of their proposal might be?

Mr. MARESCA. Well, we believe that the impact of the rule is the change in practices that small businesses would have to begin. The way that agencies measure the costs of their rules in any regulatory analysis is governed by—generally governed by OMB Circular A–4, which tells them to use the world as it is, and the world as it is right now for waters of the United States is the EPA guidance from 2008. And, this rule would—the rule, as proposed, would expand the jurisdiction as compared to that guidance.

Chairman VITTER. Okay. As we have discussed, the EPA and the Corps through this fraudulent certification are avoiding conducting this RFA analysis, including holding the SBAR panel. In your expert opinion, could the underlying RFA law be modified or strengthened to prevent this in the future?

Mr. MARESCA. Senator, the problem with this rule as proposed is the misapplication of case law and the choice—the incorrect choice of a baseline. I am not sure how to—how we would amend the RFA to approach that, those problems. However, we do think

that the RFA could be improved in the area of indirect effects and we would be happy to work with you on that.

Chairman VITTER. Could this improper action under federal law be the basis for future litigation challenging the rule?

Mr. MARESCA. Certain parts of the RFA are judicially reviewable, and an incorrect certification is one of the—could be a basis for a complaint in federal court.

Chairman VITTER. Okay. Thank you. I will turn to Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman.

I just wanted to clarify that it is my understanding, as well, that we asked both the EPA and the Army Corps to be present at today's hearing and that they were not able to do so, they said, for scheduling reasons. So I wonder, Mr. Maresca, if you could talk about why neither of those agencies seems to feel—or said that there was no need to appoint a Small Business Advocacy Review Panel. What was the reasoning for that?

Mr. MARESCA. The reasoning, as stated, is that the costs that are imposed by the rule are indirect and there is case law on the point that whether an agency needs to consider the indirect effects of a rule. We believe that the case law was misapplied. They also based their certification on the choice—on whether there was an expansion of jurisdiction or not. As compared with the 1986 rule, there is not. As compared with the 2008 guidance, there is.

Senator SHAHEEN. Right. I understand that, and I know that you pointed that out in the letter. What was the response when you did that? Because it would seem that it might be prudent to err on the side of, given the discrepancies in the statutes, to err on the side of making sure that they had responded to any potential small business concerns.

Mr. MARESCA. Senator, we would agree with that. In their own economic analysis, EPA points out that there are, in fact, costs to this rule.

Senator SHAHEEN. As I have talked to representatives from small business, I have heard from some people who feel like there will be a significant impact because of this proposed rule. There are others who feel like they support it. There are others who feel like it does not really make any difference. So, I am sure you heard those different perspectives, and can you explain how Advocacy weighted those diverse perspectives as you were trying to make recommendations and consider the position?

Mr. MARESCA. Senator, the statute requires us to do outreach to small businesses, and we have done an extraordinary amount of outreach on this rule, and we have heard from many, many small businesses in every industry that we have talked to that there are costs to this rule. We have examined EPA's numbers as they are in their own economic analysis and we conclude, along with EPA, that there are costs. We do not know at this moment how expensive those costs are. We do know that, according to EPA's own figures, the cost for a Section 404 permitting, for example, will increase by $50 million, and we think that is at least $50 million, and there are many, many other costs that have not been counted.

Senator SHAHEEN. So, when you were looking at the determination of impact, it was the cost issue that you were weighing as opposed to anything else that might be affecting small businesses?

Mr. MARESCA. That is typically what we look at, is the cost. The RFA does require us to look at ways to mitigate, to examine with the agencies ways to mitigate the cost of the rule in order to achieve the same regulatory objective.

Senator SHAHEEN. And, did you do that? Did you—when you brought those concerns about cost to the attention of the agencies, what was their response and did you have any discussions about potential mitigation to address those?

Mr. MARESCA. Senator, in the several meetings that we have had with EPA, with the small entity representatives, with small business stakeholders, that has been brought up. I would suggest the response of EPA is this proposed rule. But, there has been—there is no—if there had been a SBREFA panel, there would have been a presentation of alternatives and there could have been a consideration of whether those alternatives—which of those alternatives would mitigate the cost to small entities the best.

Senator SHAHEEN. So, basically, they said, we do not need to appoint a panel because we do not think there are any costs involved.

Mr. MARESCA. That is correct.

Senator SHAHEEN. Okay. Thank you, Mr. Chairman.

Chairman VITTER. As we go to Senator Ernst, I just want to clarify something. A couple of times, Senator Shaheen asked about their response. In terms of your written letter strongly objecting to their certification, has there been any direct written response?

Mr. MARESCA. No, Senator, there has not been a written response. That is not unusual. The statute requires that EPA respond in writing to our written comments, so we do expect there will be a written response, but there is not one at this point.

Chairman VITTER. There has not been to date?

Mr. MARESCA. No.

Chairman VITTER. Is there any assurance that they are going to do that, even before they come up with this proposed rule?

Mr. MARESCA. It would—as I say, it would be unusual for an agency to respond in writing to our comment letters before they issue a final rule.

Chairman VITTER. Okay. Senator Ernst.

Senator ERNST. Thank you, Mr. Chair, and thank you, Mr. Maresca, for being here today.

It is greatly concerning. I wish we would have had the Corps members and the EPA representatives here. Very early this year, I sent a letter to the EPA Administrator and asked her to come to Iowa. I would love to have her in Iowa with some of her leadership just to show her the impact on small businesses, manufacturers and members of our agriculture community, when it comes to waters of the United States. I have yet to hear back from the EPA, which I thought was—at least they could have responded to me. So, very disappointed that they are not able to join us and give their perspective on this particular rule.

I am also concerned—you mentioned that the EPA, because they are not direct costs, just maybe indirect costs, they did not feel the need to look at this any further. That is deeply troubling to me be-

cause there are so many times that we talk through the implications of legislation or rules and regulations and what are those secondary and tertiary effects that will hurt our small businesses. So, disappointed to hear that.

But, in addition to the work here in the Small Business Committee, I also sit on Homeland Security and Governmental Affairs, and one of the subcommittees that I sit on also focuses on regulatory reform. And, through that particular subcommittee we have done a few hearings on the regulatory climate that we have right now, and one of the recurring themes I have heard about and we have discussed seems to be the trend of these federal agencies going around the necessary and appropriate economic and cost analysis—cost/benefit analysis.

And, as an independent office within the SBA, can you speak a little more about these issues as it pertains to the federal agencies and them trying to circumvent what I see as a specified process. Can you speak to that?

Mr. MARESCA. Certainly, Senator. In general, we find the agencies are very good at complying with the Regulatory Flexibility Act. We have worked with the agencies to train them in how to do that since 2003. And, in fact, EPA is one of our model agencies. So, when they make these kinds of judgments, it seems it is unusual. But, when they do, there are costs involved, and the RFA requires that they, in this case, convene a SBREFA panel.

Senator ERNST. Very good. Do you think that in this case, they did take any public comment into judgment? Did they look at those, do you believe? Have they indicated any of that to you?

Mr. MARESCA. Well, they have—they also convened several roundtables and participated in stakeholder events. The outcome, again, is this rule that does have significant economic impact on small business.

Senator ERNST. Very good. Thank you.

Thank you, Mr. Chair.

Chairman VITTER. Sure. Senator Markey.

Senator MARKEY. Thank you, Mr. Chairman, very much.

Welcome, sir.

Mr. MARESCA. Thank you.

Senator MARKEY. Thank you for being here. Clean water is important to everyone. Eighty percent of small business owners, a clear majority, favor the rules, clarifications in wetlands protection set forth in the Clean Water rule, and EPA and Army Corps of Engineers have spent years engaging in a transparent rulemaking process. The agencies have met with stakeholder small businesses, received over one million comments, held over 400 outreach meetings, used important time and resources, and above all, important taxpayer dollars, and are now just weeks away from producing a final Clean Water rule that will protect our nation's vulnerable waterways and drinking water for 117 million Americans.

But, what you are saying is the agency should put the brakes on the implementation of this economically critical and scientifically rigorous rule before the public has even had a chance to see the finished product. A decision like that would disrupt and prolong the rulemaking and forces the agencies to go back and solicit input from stakeholders they have already consulted, consider factors

they have already considered, and then propose the rule all over again.

Has your office considered the impact on small businesses of delaying the rulemaking and prolonging the uncertainty for small businesses about what will be regulated under the Clean Water Act?

Mr. MARESCA. Yes, Senator. Those are concerns of our office. The main concern that we have is compliance with the Regulatory Flexibility Act. Every rule that EPA produces has to comply with the RFA, and in this instance, it did not—they did not comply with the RFA. And, so we—and, so, our job at Advocacy is to speak for small businesses in that instance.

Senator MARKEY. Well, in the Environment and Public Works Committee, we heard testimony from the New Belgium Brewery on behalf of the businesses around the country that rely on clean water for the success of their business. How does the Office of Advocacy take the needs of those companies into effect?

Mr. MARESCA. Senator, we take the needs of every small business that we possibly can into account. Again, our statutory obligation is to get federal agencies to comply with the Regulatory Flexibility Act, and in this instance, EPA should have convened a SBREFA panel.

Senator MARKEY. Well, the EPA has estimated that waste from mountaintop removal coal mining has buried between 1,200 and 2,000 miles of Appalachian streams. This mining practice has in some communities been linked to contamination of water supplies, endangered wildlife, and threatened public health, all so that much of the coal produced from the Appalachian region can be exported to other countries in the world to increase profits for the coal companies.

By opposing the Clean Water rule, coal companies are continuing their assault on the administration's actions to protect the public health and the environment from mountaintop removal mining. Fossil fuel companies have also threatened legal challenges to the rule before it has even been issued.

Will you please tell the committee the groups and associations that your office met with or which groups encouraged the Office of Advocacy to submit your comments about the Clean Water rule.

Mr. MARESCA. Senator, we met with small businesses in every industry that we could find. They all said that there were going to be costs to this rule.

Senator MARKEY. Will you submit to the committee the companies that you met with, just so that we can have an understanding of who it was that was seeking to lobby you on this issue?

Mr. MARESCA. We would be happy to do that.

Senator MARKEY. Okay. That would be very helpful.

A delay in the Clean Water rule would provide confusion, not clarity, for small businesses and add to the delay of important infrastructure projects and will create jobs—that will create jobs and grow our economy. What would you say to an unemployed iron worker, laborer, or American driver that just crossed a near-crumbling bridge or pothole about the delay in the final Clean Water rule?

Mr. MARESCA. Senator, the point of the Regulatory Flexibility Act is to create an environment for small businesses to thrive and grow and provide more jobs, ultimately, and our job is to ensure that the federal agencies comply with the requirements of the statute.

Senator MARKEY. How many public meetings should an agency have to hold on a proposed rule, in your opinion?

Mr. MARESCA. Senator, I would say that probably varies with the impact of the rule. But, in this instance, EPA should have convened a SBREFA panel.

Senator MARKEY. Is 400 outreach meetings insufficient to solicit input on a proposed rule?

Mr. MARESCA. Senator, in none of those outreach meetings, to my knowledge, did EPA present regulatory alternatives or preferred options. In none of them did they present the data on which they were basing the rule.

Senator MARKEY. And, finally, are you aware that OMB reviewed the proposed rule and made the determination that the proposed rule would not have significant impact on small businesses? Are you aware of that?

Mr. MARESCA. Senator, it is our statutory obligation to speak on behalf of small businesses when it comes to issues under the Regulatory Flexibility Act. In our opinion, EPA should have convened a SBREFA panel because this rule will have impacts.

Senator MARKEY. I think that we should let the EPA do its job. I think delaying the Clean Water rules makes no sense. Small business owners need clarity, not confusion. That is what your recommendations are going to create and we are just going to repeat the same process and, I think, come to the same conclusions.

Thank you, Mr. Chairman.

Chairman VITTER. Thank you.

Senator SHAHEEN. Mr. Chairman, can I just ask that when we receive the list from the Office of Advocacy about the businesses you met with, that that be shared with all of the members of the committee?

Chairman VITTER. Certainly. Of course. Without objection.

Senator SHAHEEN. Thank you.

Chairman VITTER. And, now we will go to Senator Gardner.

Senator GARDNER. Thank you, Mr. Chairman. Thank you for holding this hearing, and to Ranking Member Shaheen, thank you, as well, and to Mr. Maresca, thank you for being here.

I, unfortunately, came in later to the discussion on waters of the United States, but I do want to stress one of the challenges that we have in Colorado. Of course, we are unique among the states. We are the only state in the country that distributes our water rights the way we do, through a court system. We are entirely unique in that in the lower 48 states, all of the water flows out of Colorado. No water flows into Colorado.

In conversations with the EPA Administrator, Gina McCarthy, at a hearing last year in the Energy and Commerce Committee, I asked point blank if she was familiar with Colorado water law and her response back was she is not familiar with Colorado water law. And, I think the challenges—just one of the many challenges that we face, that this rule would apply to rivers that are intermittent

flow. Two-thirds of Colorado waterways are intermittent flow, and yet waters of the United States would still affect and impact every single one of them, even though they do not have water in them year-round.

In meetings with Colorado water districts, whether it is Northern Colorado Water Conservancy Districts, whether it is Denver Water, Colorado Springs Utilities, or the Colorado Farm Bureau, every one of them is concerned about the federalization of every molecule of water in the State of Colorado, and so I think you are right to make sure and demand that these hearings proceed in terms of understanding all that the waters of the United States rule would do to small businesses, particularly in light of the way a state like Colorado manages its water rights.

I wanted to shift focus a little bit to the Endangered Species Act. A few years ago, the Small Business Administration's Office of Advocacy submitted comments to the Fish and Wildlife Service on a proposed rule on designation of critical habitat for the New Mexico jumping mouse. The Office of Advocacy expressed several concerns about listing the mouse under the Endangered Species Act and stated that the designation would impose direct costs on the nation's small businesses.

As we have seen in Colorado, we have got the Gunnison and greater sage grouse. The Gunnison was just listed. I believe there is litigation coming forward from Governor Hickenlooper in the state. We have challenges with the lesser prairie chicken and, of course, the Preble jumping mouse.

Just yesterday, the administration announced proposed updates to the implementation of the Endangered Species Act, which, it is my understanding, are intended to give states a greater voice in the listing determinations. How can the Office of Advocacy further insert themselves into this type of policy making, since small businesses are our nation's job creators?

Mr. MARESCA. Well, with regard—thank you, Senator. With regard to the Endangered Species Act, we believe that Fish and Wildlife Service could do a better job in considering the impacts, not of the listing, necessarily, but of the critical habitat designations, and we have been working with that agency over many, many different CHDs.

Senator GARDNER. So, how would you improve the critical habitat designation? Does that mean taking into account, for instance, in the greater sage grouse, the 11 states, would that suggestion say, take a look at the large land area that would be involved and then doing an economic analysis of the impact that land area would have for critical habitat?

Mr. MARESCA. We believe that Fish and Wildlife could take better account of the economic analysis. They have broad authority to exclude certain parts of an initial CHD, and we have been working with the agency on that.

Senator GARDNER. And, your concern about critical habitat, of course, is because that land then is taken out of either production value or recreational interest activities. Is that why, primarily?

Mr. MARESCA. That would be the impact. That would be the impact. The point of the Regulatory Flexibility Act is not to avoid the outcomes that another statute might require, but that whatever

regulatory option an agency considers, it considered that with the least impact on small businesses.

Senator GARDNER. Okay. Under the Regulatory Flexibility Act, do you believe that we are right now properly evaluating listings prior—excuse me, that we are taking actions and considering them properly under the RFA prior to ESD listing?

Mr. MARESCA. Prior to the listing?

Senator GARDNER. Yes.

Mr. MARESCA. Uh——

Senator GARDNER. And how could we improve that process so that Fish and Wildlife Service does this——

Mr. MARESCA. We believe that post-listing, prior to the critical habitat designation, improvements could be made.

Senator GARDNER. What kind of improvements?

Mr. MARESCA. Improvements in how Fish and Wildlife considers the economic impact and takes that into account.

Senator GARDNER. What would that improvement—what would that consideration look like in how they take it into account?

Mr. MARESCA. It would probably—it would—Senator, I believe it would take a combined effort by our office and Fish and Wildlife to come up with a system that would actually accomplish that.

Senator GARDNER. Thank you.

Thanks, Mr. Chairman.

Chairman VITTER. Thank you.

And, before we go on to our second panel, I just wanted to follow up on Senator Markey's thoughts. Mr. Maresca, in the Regulatory Flexibility Act, is there sort of an "ends justifies the means" section that says, you know, if the rule is really, really good, we do not have to worry about following the law, or if we consult stakeholders in a different way, we do not have to worry about convening this sort of panel?

Mr. MARESCA. Senator, there is no exception to the requirement of convening a panel, at least not without consulting with the Chief Counsel for Advocacy. Under a section of the RFA, it could be waived, but that is only under extraordinary circumstances.

Chairman VITTER. Okay. Thank you.

Senator Shaheen, anything else?

Senator SHAHEEN. No further questions.

Chairman VITTER. Great. Thank you very much, Mr. Maresca.

We will move on to our second panel, and as the second panel gets seated, I will invite Senator Ernst to recognize and introduce Mrs. Maulsby on the second panel.

OPENING STATEMENT OF HON. JONI ERNST, A U.S. SENATOR FROM IOWA

Senator ERNST. Yes. Thank you, Mr. Chairman, very much.

As the second panel is getting settled, I will go ahead and start off by thanking all of you for joining us here today. It is good to have you with us.

I do appreciate your testimony and attention to this important widespread economic and regulatory issue. The EPA's proposed expanded definition of waters of the United States, or as we fondly call it, WOTUS, will add unnecessary bureaucratic red tape for our producers in the agriculture and small business communities.

The EPA has stated that the rule has been crafted with the intentions of creating clarity and increasing efficiency for key stakeholders. However, in reality, the proposed rule has only expanded confusion and uncertainty as to how far the jurisdiction of the Clean Water Act reaches.

It is incredibly important that before this rule is finalized, we stop it from having any negative consequences on our producers and businesses. And, if the EPA still fails to listen to the many voices raising concerns, including those of many of you in this room today, then we should all come together and oppose this rule.

Today, it is my great pleasure to introduce one of those voices. Darcy Maulsby is a fifth-generation corn and soybean farmer and small business owner from Lake City, Iowa. Her work, both on the farm and in owning a communications and marketing business, has given her a unique opportunity to engage local, national, and world leaders to promote the benefits of agriculture to our economy. Mrs. Maulsby has used her skills in journalism and mass communications to reach untold audiences, promoting the importance of improving production and conservation practices and life in rural America.

Mrs. Maulsby, Darcy, it is always good to have a fellow Iowan in Washington, and thank you very much for testifying today. Your words are going to be very important for this panel. I will not be able to stay for questions, but I will submit those for the record.

And, just so everybody knows, they did have quite an episode a few weeks ago with a tornado that came through Lake City, and so, Darcy, we appreciate the extra effort that it took for you to come and be with us today, so thank you very much, and thanks to everybody on the panel, as well.

Thank you.

Chairman VITTER. Thank you, Senator, and let me just round out the introductions.

Randy Noel is President of Reve Incorporated, a custom home building company based in La Place, Louisiana.

Elizabeth Milito is Senior Executive Counsel with the National Federation of Independent Business' Small Business Legal Center in Washington, D.C.

And, Benjamin Bulis is President of the American Fly Fishing Trade Association on Bozeman, Montana.

Welcome to all of you. We look forward to your testimony in the order in which you have been introduced. Ms. Maulsby.

STATEMENT OF DARCY DOUGHERTY MAULSBY, FIFTH-GENERATION FARMER, DOUGHERTY FARM, LAKE CITY, IA

Mrs. MAULSBY. Well, good afternoon. I am Darcy Maulsby, a fifth-generation farmer and small business owner from Lake City. Let me begin by thanking you, Chairman Vitter, Ranking Member Shaheen, and members of the committee for allowing me the opportunity to share my story with you today. I especially want to thank my home state Senator for inviting me to testify. Thank you, Senator Ernst—even though she has left the room—for this opportunity and the warm introduction.

Our farm is located in west central Iowa. This is a beautiful area where the fields are mainly flat or gently rolling and are filled with

rich black soil. While this soil is extremely productive, it also needs proper management and drainage to protect the health of our corn and our soybean crops.

My family and farmers all across Iowa are investing in conservation practices that prevent nutrient runoff and safeguard water quality. Ever since my ancestors settled in Calhoun County in the 1880s, my family has adopted a variety of conservation practices to protect our precious natural resources. We have installed grass waterways to slow the flow of water and keep soil in place. We also use conservation tillage to leave cornstalks and soybean stubble in the fields over the winter to protect soil from water and wind erosion and to control surface runoff.

We have taken some big steps to implement conservation efforts, but one thing we cannot control is Mother Nature. Just over a week ago, on Mother's Day, an EF–1 tornado ripped through our area. Less than an hour later, a second storm blasted our farm with hail and dumped more than an inch-and-a-half of rain in a matter of minutes. This created some fairly large ponds in some of our fields, since the heavy clay soils just could not drain that water fast enough. The ponds are temporary, though, and they disappeared in a few days.

Across my area and much of Iowa, it is not uncommon for puddles and ponds to appear after a heavy rain in areas that are otherwise dry most of the year. Expanding EPA's regulatory authority under the Clean Water Act to include these and similar areas will have many negative consequences for my farm business. Not only will this rule affect my operation personally, but it will have dramatic and far-reaching potential and costly economic implications on farmers and ranchers all across the United States.

One of the biggest problems with this rule is the uncertainty that it creates. I look around my family farm and I wonder what areas would be under EPA's jurisdiction. There are many features on farmland that contain or carry water only when it rains. Farmers and ranchers consider these areas to be land, not water that could be regulated by the EPA. If this agency can regulate every body of water on my farm, including those that are dry most of the time, then there are effectively no limits to the agency's regulatory reach.

The regulation of these areas means that any activity, including everyday farming activities, could be a violation of the Clean Water Act, triggering heavy penalties, criminal fines, and possibly resulting in jail time. Not only would we be subject to enforcement from the EPA and the Corps, but also civil lawsuits from those who do not understand agriculture and belong to organizations who are opposed to our way of life.

I am also concerned about how the rule will hinder the ability to keep our farm competitive, profitable, and sustainable. Tens of thousands of dollars to obtain permits along with fees for both lawyers and technical consultants is beyond the means of most farmers and ranchers and creates an undue burden for most farms, which are largely family owned operations. These permits may take months to more than two years to obtain. Having to wait to obtain a permit would hinder our ability to operate and do what we know is best for our land. As a result, the proposed rule puts EPA into

the business of regulating whether, when, and how a farmer's crops may be grown and protected.

Perhaps the largest cost of this rule is not being allowed to apply crop nutrients and crop protection products in and around these EPA-controlled areas. We have always worked to be good stewards of our land and want to prepare now for a sustainable future for our farm. If we cannot do the right things for our land and our crops when the job needs to be done, farming and ranching will be much more costly and more difficult.

I am also concerned about how permitting delays would hold up conservation efforts on our farm and farms nationwide. We have already experienced this on my farm when we applied for a permit for a drainage improvement. In this case, the permitting process was not completed in a timely manner due to delays from an agency. This cost us valuable time and hindered our ability to enhance our land, and it complicated the process of completing routine field work.

We are continually implementing voluntary conservation efforts using our own time, energy, and money. The only thing that is clear and certain is that this rule will make it more difficult for farm families like mine to make changes in the land that will benefit the environment. Working with farmers collaboratively is a productive way to improve water quality, not more regulations.

Ultimately, this rule will have a negative impact on the productivity and profitability of small farming businesses all across the country, those one percent of Americans who grow the food, fuel, and fiber for this country and the world.

As a fifth-generation farmer, I truly care about the legacy my family will leave behind. I urge you to think about the legacy that will be left behind if this harmful rule is implemented. This rule should be repealed in full to protect the livelihood and way of life for my family and farm families all across this great land. Thank you.

[The prepared statement of Mrs. Maulsby follows:]

Testimony of

Darcy Maulsby, Owner/Operator

Dougherty Farm

Lake City, Iowa

"An Examination of Proposed Environmental Regulation's Impact on America's Small Businesses."

United States Senate

Committee on Small Business and Entrepreneurship

May 19, 2015

Washington, DC

Darcy Maulsby, Owner/Operator
Dougherty Farm
Lake City, Iowa

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Thank you.

Chairman VITTER. Thank you very much, Mrs. Maulsby.

And now, we will hear from Mr. Randy Noel. Welcome.

STATEMENT OF KARL RANDALL "RANDY" NOEL, PRESIDENT, REVE INCORPORATED, LA PLACE, LOUISIANA, AND THIRD VICE CHAIRMAN, NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. NOEL. Thank you, Chairman Vitter and Ranking Member Shaheen, for the opportunity to address you today. I am a home builder in La Place, Louisiana, which is just west of New Orleans, and I am also the NAHB, the National Association of Home Builders, 2015 Third Vice Chairman, and I represent about 140,000 people.

Home building is one of the most regulated activities in the country, and as a small business owner, I can tell you from 30 years of home building experience what it will take to make a good rule. It needs to be consistent for all the citizens. It needs to be predictable to assure compliance. And, it needs to be timely to serve our citizens efficiently. Most important, it needs to focus on protecting true wetlands and streams.

The proposed rule does none of that. For decades, landowners and regulators alike have been frustrated by confusion over the definition of waters of the United States. When EPA and the Army Corps of Engineers proposed this rule, we were actually optimistic that it would finally provide clarity and certainty. Unfortunately, the proposed rule falls far short of that. In a word, it is a mess.

Instead of clarity, it provides broader definitions of existing regulatory categories, such as tributaries, and it seeks to regulate new areas that are not currently federally regulated, such as adjacent non-wetlands, riparian areas, flood plains, and other waters. It appears that the agencies have intentionally created overly broad terms so that they would have the authority to interpret them any way they would like.

This rule is so extreme that the federal government would actually regulate roadside ditches, or water features that may flow only after a heavy rainfall. This rule would leave me playing a guessing game of whether my land requires a permit or not. That does not work.

I am a small business owner. I need to know the rules, not have to guess at them. And, because of the vague definitions, builders would face new, costly delays just waiting for the agencies to determine if a roadside ditch is a water of the United States.

My business has already been a victim of a costly permitting system. I have been forced to walk away from building projects due to excessive permitting and mitigation costs. The only winners with the proposed rule would be lawyers, because this rule would certainly lead to increased litigation.

I think it is important to note that this proposed rule also destroys a key component of the Clean Water Act. The Act intended to create a partnership between the federal agencies and state governments to protect our nation's water resources. Congress correctly recognized that there is a point where federal authority ends and state authority begins. The agencies' solution is to federalize nearly every water feature.

States have effectively regulated their own waters and wetlands for years. My home State of Louisiana is a perfect example of a state that has gone to great lengths in order to protect its waters. Louisiana already has multiple laws on the books designed to protect our state water resources.

The agencies also failed to consider the rule's impact on small businesses by ignoring, as you pointed out earlier, the Regulatory Flexibility Act. Since the agencies failed to convene a small business panel, it is clear that they are not interested in hearing from small businesses like mine.

Unfortunately, the EPA completely ignores RFA requirements all the time. This is not something unique to this particular rule. In the 19 years since the small business panel requirement has existed, the EPA has convened approximately 47 panels. Just last year, the EPA reviewed 51 significant rules. It defies belief that in one year, EPA reviewed more regulations than the total number of SBREFA panels held over 19 years. This illustrates how reluctant some agencies are to comply with the law.

And, the agencies' economic analysis of the proposed rule is so full of errors that one noted economist said the study was virtually meaningless. That should give us all pause.

I called this a mess, and it is, but we can start to fix the mess. The EPA should withdraw the economic analysis and prepare a more thorough and accurate analysis. The RFA's legal requirements should be followed. And, any final rule should provide easily understood definitions and preserve the partnership between all levels of government.

Let us get the agencies to withdraw the rule. Fix this mess. Provide the clarity we all need on what constitutes a water of the United States.

Thank you again for the opportunity to testify.

[The prepared statement of Mr. Noel follows:]

Testimony of Randy Noel

President, Reve Inc.

Third Vice Chairman of the National Association of Home Builders

Before the

United States Senate

Small Business Committee

Hearing on "An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses"

May 19, 2015

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today. My name is Randy Noel, and I am NAHB's Third Vice Chairman. As the president of Reve Inc., a custom home building firm based in La Place, Louisiana, I also own and operate a small business. I have more than 30 years of experience in residential construction, and my company has built more than 1,000 homes in the greater New Orleans area.

NAHB members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Our industry is dominated by small businesses, and NAHB's average builder member has 11 employees. Since its inception in 1942, NAHB's primary goal has been to ensure that housing is a national priority and that all Americans have access to safe, decent and affordable housing, whether they choose to buy or rent a home.

Like all Americans, NAHB members understand the need for a clean environment and the benefits that it brings to the nation, its communities and their residents. And as small business owners, NAHB members have a vested interest in preserving and protecting our nation's land and water resources.

As a second-generation home builder, I have first-hand knowledge of how the federal government's regulatory process affects businesses in the real world and of how the federal government's regulatory oversight has expanded and become more complex in recent decades.

Small business owners like myself want a regulatory structure that is consistent, predictable, timely, and, in the case of Waters of the United States, focused on protecting true aquatic resources. As an industry, our goal is to see the implementation of more sensible regulatory programs that include straightforward compliance requirements. Unfortunately, this has proven to be an elusive goal.

Smart regulation needs to strike this balance. And from our perspective, part of striking that balance means recognizing that additional regulations make it more difficult for builders like me to provide homes at a price point that is affordable to working families—a reality that affects both renters and prospective buyers.

According to an NAHB study, government regulations account for up to 25% of the price of a single-family home. Nearly two-thirds of this price impact is due to regulations related to developing the lot. The rest is due to regulations imposed on the builder during construction.[1]

These regulatory requirements aren't limited to those imposed by the federal government. Regulations are imposed on home building by state and local governments as well. And let me be clear, these costs are not absorbed by the builder. They are passed directly to customers in the form of higher housing costs.

The stunning cost of government regulation of home building raises another key point on how to create smarter regulations. I believe a key component of effective regulation is ensuring that local, state and federal agencies cooperate to streamline permitting requirements and respect the appropriate responsibilities of each level of government. The need for cooperation is particularly true for the Clean Water Act, which delegates oversight of the nation's waters to both the federal government and the states.

Since its inception in 1972, the Clean Water Act (CWA) has helped the nation to make significant strides in improving the quality of our water resources and our lives. As environmental stewards, the nation's home builders construct neighborhoods and help create thriving communities while maintaining, protecting, and enhancing our natural resources.

Under the CWA, home builders must obtain and comply with section 402 and 404 permits to complete their projects. A key challenge to compliance is the lack of a clear definition of "waters of the United States." As a result, it is often difficult to determine what is subject to federal jurisdiction, and what types of waters fall under state jurisdiction.

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[1] Survey conducted by Paul Emrath, National Association of Home Builders, "How Government Regulation Affects the Price of a New Home," 2011

"Waters of the United States" Proposed Rule:

On April 21, 2014, the Environmental Protection Agency and U.S. Army Corps of Engineers ("the agencies") proposed a rule redefining the scope of waters protected under the CWA. For years, land owners and regulators alike have been frustrated with the ongoing uncertainty over the scope of federal jurisdiction over "Waters of the United States." By improving implementation of the CWA, removing redundancy, and further clarifying jurisdictional authority, the agencies are hoping they can do a better job of facilitating CWA compliance while protecting and improving the aquatic environment.

Unfortunately, the rule falls well short of providing the clarity and certainty the construction industry needs. This rule will increase federal regulatory power over private property and will lead to increased litigation, additional permit requirements, and more delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features that are already regulated at the state level.

Addressing the Impacts on Small Entities

Moreover, the agencies completely ignore the impact this rule will have on small entities. They claim "...(t)hat fewer waters will be subject to the CWA under the rule than are subject to regulation under the existing regulations; this action will not affect small entities to a greater degree than the existing regulations."

This is not accurate. In reality, the rule establishes broader definitions of existing regulatory categories, such as tributaries, and it regulates new areas that are not jurisdictional under current regulations, such as adjacent non-wetlands, riparian areas, floodplains, and other waters.

The agencies intentionally created overly broad terms so they have the authority to interpret them as they see fit in the field. These new definitions will include substantial additions, such as a first time inclusion of ditches, conveyances and other water features that may flow, if at all, only after a heavy rainfall. Unless proper mapping is provided by the agencies, it may be impossible for a home builder to independently identify what is jurisdictional. That means a home builder would have to go through an expensive and lengthy process just to get the agencies to identify what is covered.

In addition, the proposal suggests that "neighboring" could include any wet feature within a "floodplain." Since floodplains can extend for miles from traditional navigable waters, the agencies can now claim that those features, miles away, can be considered neighboring. This is a far cry from what Congress intended to be covered by the CWA. The last thing any small

business trying to comply with the law needs is a set of new, vague and convoluted definitions that only provide another layer of uncertainty.

These definitions will result in ongoing uncertainty for home builders. This unpredictability will make it difficult for a small builder's business to comply and grow. The agencies suggest that the rule provides clarity; however, all it does is produce more questions. These changes have far reaching implications and will negatively alter the way we conduct business but will not improve environmental protections.

Regulatory Flexibility Act

More than three decades ago, Congress acknowledged that small businesses are often disproportionately impacted by federal regulations and enacted the *Regulatory Flexibility Act* (RFA). It requires federal agencies to assess the true impacts a rule will have on small businesses.

Specifically, the RFA requires federal agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. [2] When an agency issues a rulemaking proposal, the RFA requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities."[3]

The RFA states that an initial regulatory flexibility analysis (IRFA) shall address the reasons that an agency is considering the action; the objectives and legal basis of the rule; the type and number of small entities to which the rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and all federal rules that may duplicate, overlap, or conflict with the proposed rule. The agency must also provide a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes which minimize any significant economic impact of the proposed rule on small entities.[4]

Section 605 of the RFA allows the agency proposing a new rule, in lieu of preparing an IRFA, to certify that a rule is not expected to have a significant economic impact on a substantial number of small entities. If the head of the agency makes such a certification, the agency must publish the certification in the Federal Register along with a statement providing the factual basis for the certification.[5]

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[2] 5 U.S.C. 601-612
[3] 5 U.S.C. 603(a).
[4] 5 U.S.C. 603(c).
[5] 5 U.S.C. 605.

While the original congressional intent and subsequent additions and enhancements to the RFA are praiseworthy, the reality is that far too often agencies either view compliance with the Act as little more than a procedural "check-the-box" exercise, or they artfully avoid compliance.

In this instance, the agencies have bypassed the safeguards of the RFA by certifying the proposed rule. NAHB believes that the agencies should have conducted an IRFA to assess the impact this rule will have on small business entities. A more thorough analysis of the proposed requirements would have revealed the disproportionate burdens that this rule imposes on small residential home builders.

As a small business owner, I take issue with the fact that the agencies have ignored me. I urge the Committee to closely examine the process that led the agencies to determine that this rule would have no significant impact on small entities and to increase the level of oversight into how federal agencies comply with the *Regulatory Flexibility Act*.

Small Businesses Regulatory Enforcement Fairness Act Requirements

Under the 1996 amendments to the RFA, known as the Small Businesses Regulatory Enforcement Fairness Act (SBREFA),[6] if the Occupational Safety and Health Administration (OSHA) or Environmental Protection Agency (EPA) prepares an IRFA, they must first notify the Chief Counsel for Advocacy of the Small Business Administration ("Advocacy") and provide Advocacy with information on the potential impacts of the proposed regulation on small entities. Advocacy must then identify individual representatives of affected small entities in order to obtain advice and recommendations about the potential impacts of the proposed rule. The agency must convene a review panel made up of representatives from the agency, Advocacy, and the Office of Management and Budget to review the materials the agency has prepared, collect advice and recommendations from the small entity representatives (SERs), and issue a report of the panel's findings. Following this process, the agency shall modify the proposed rule, the IRFA, or the decision on whether an IRFA is required if the panel report warrants any changes.[7]

In the 19 years since the RFA was amended by SBREFA to include the panel requirement, EPA has convened approximately 47 panels, according to information on EPA's web site. In 2014, EPA reviewed 51 significant rules. It defies belief that in one year EPA reviewed more regulations than the total number of SBREFA panels over 19 years. This illustrates how reluctant the EPA is to comply with the law.

[6] 5 U.S.C. 609.
[7] 5 U.S.C. 609(b) (1) through (6).

It was very surprising to me that the agencies decided to certify the rule, thereby completely bypassing the RFA process. It was also surprising to Advocacy. In a letter dated October 1, 2014, they publicly admonished the agencies because they "improperly certified this rule" and stated that the rule "will have a direct impact on small businesses."

Clearly, the agencies are not interested in hearing from the regulated community. Their only objective is to move this regulation closer to the finish line. For a rule of this magnitude, the small business voice must be heard, and the agencies have failed to provide that platform. Again, this is another area where I encourage the Committee to increase oversight into whether federal agencies are improperly avoiding their SBREFA mandates.

Ensuring Compliance with Small Entity Feedback Requirements

While section 611 of the RFA provides for judicial review of some of the act's provisions, it does not require permit judicial review of section 609(b), which contains the panel requirement.[8] NAHB believes that the RFA should be amended to include judicial review of the panel requirement to ensure that the agencies adhere to the law. If the RFA allowed judicial review of section 609(b), agencies would feel more pressure to comply by convening a meaningful panel of Small Entity Representatives (SER) that can thoughtfully and substantively advise the agency, as Congress intended. Knowing that its decision on whether or not to convene a panel could result in a judicial remand of a regulation would present a strong incentive to agencies to conduct a panel at the early stages in rule development. Without a judicial backstop or other enforcement mechanism, there is no way to compel the agency to implement a clear congressional directive. When agencies evade their responsibility to convene review panels, they remove small business input entirely from the process.

The Agencies' Flawed Cost-Benefit Analysis

Not only did the agencies fail to perform the required RFA analysis to determine the proposal's economic impacts on small businesses, the agencies' economic analysis of the proposal is fatally flawed.

The Environmental Protection Agency's (EPA) *Economic Analysis of Proposed Revised Definition of Waters of the United States* fails to provide a reasonable assessment of costs and benefits as required by Executive Order 12866. Economist Dr. David Sunding, the Thomas J. Graff Professor

[8] Section 611(a)(1)states: "For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7. Agency compliance with sections 607 and 609(a) shall be judicially reviewable in connection with judicial review of section 604."

at the University of California-Berkeley's College of Natural Resources, has identified several major flaws with the analysis.

According to Dr. Sunding, the analysis relies on a flawed methodology for estimating the extent of newly jurisdictional waters and thereby underestimates the incremental wetland acreage that will be impacted, excludes several important types of costs, and uses a flawed benefits methodology. In fact, he stated that "the errors and omissions in EPA's study are so severe as to render it virtually meaningless."[9] For example, one of the many problems that he acknowledged was the unreliable data sample the EPA used in the analysis:

> "The analysis uses FY 2009/2010 as the baseline year to estimate impacts. FY 2009/2010 was a period of significant contraction in the housing market due to the financial crisis. Construction spending during these two fiscal years was 24% below that of the previous two-year period. In statistical terms, this is an issue of sample selection, where due to exogenous events the sample selected for the analysis is not representative of the overall population. The report bases its finding on a period of extremely low construction activity, which will result in an artificially-low number of applications and affected acreage. Even if the percent increase in added permits is correct, using the number or permits issued in 2010 as a baseline is very likely a significant underestimation of the affected acreage in years not subject to a crisis in the building sector."[10]

In addition, EPA's calculation of incremental costs is deficient. EPA's analysis excludes several important types of costs, such as costs associated with permitting delays, impact avoidance and minimization. Also, EPA's analysis of Section 404 costs relies on permitting cost data that are nearly 20 years old and are not adjusted for inflation.

Finally, EPA uses a flawed methodology for its calculation of benefits. EPA's analysis adopts an all or nothing approach to assessing benefits by assuming that all wetlands affected by the rule's definitional change would be filled. On the flip side, they assume that the rule would preserve or mitigate land if federal jurisdiction is extended by the rule. These unrealistic assumptions contribute to an inflated benefits calculation.

It is clear that the EPA should withdraw the economic analysis and prepare an adequate analysis of this major change to the CWA. Yet again, the agencies are painting an inaccurate picture of how this regulation will affect small businesses.

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[9] David Sunding, "Review of 2014 EPA Economic Analysis of Proposed Revised Definition of Waters of the United States," 2014

[10] Id at Page 2

Costs to the Home Building Industry

Home building is a complex and highly regulated industry. As costs, regulatory burdens, and delays increase, the small businesses that make up a majority of the industry must adapt. This can include paying higher prices for land, purchasing smaller parcels, redrawing development or house plans, and/or completing mitigation. All of these adaptations must be financed by the builder, and ultimately result in higher prices for consumers and lower production for the industry. As production declines and jobs are lost, other sectors that buy from or sell to the construction industry also contract and lose jobs. Builders and developers, still struggling to emerge from the economic downturn, cannot depend upon the future home buying public to absorb the multitude of costs associated with overregulation.

Compliance costs for regulations are often incurred prior to home sales, so builders and developers have to finance these additional carrying costs until the property is sold. Because of the increased price, it may take longer for the home to be sold. Carrying these additional costs only adds more risk to an already risky business, yet is one of the difficult realities that home builders face every day. This rule, had it actually clarified what is a federally-jurisdictional water, would have reduced our regulatory burden; instead, it adds to the headwinds that our industry faces.

Home buyers are extremely price sensitive, and even moderate cost increases can have significant negative market impacts. This is of particular concern in the affordable housing sector where relatively small price increases can have an immediate impact on low-to moderate-income home buyers. As the price of the home increases, those who are on the verge of qualifying for a new home will no longer be able to afford this purchase. NAHB has estimated the number of households priced out of the market for a median priced new home due to a $1,000 price increase. Nationwide, if the cost of a median priced new home were to increase from $225,000 to $226,000, a total of 232,447 households would no longer be able to afford that home.

The picture becomes dire when you consider the time and cost to obtain a CWA section 404 permit. A 2002 study found that it takes an average of 788 days and $271,596 to obtain an individual permit and 313 days and $28,915 for a "streamlined" nationwide permit. Over $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.[11] Importantly, these ranges do not take into account the cost of mitigation, which can be exorbitant. In a number of instances, my business has been the victim of these exorbitant costs. My company has been forced to walk away from building projects simply due to the excessive

[11] David Sunding and David Zilberman, "The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process," 2002

permitting and mitigation costs. It is evidently clear that we need to find a better balance between protecting our nation's water resources and allowing small businesses to survive.

Delays Will Lead to More Delays

Construction projects rely on efficient, timely, and consistent permitting procedures and review processes under CWA programs. Builders and developers are generally ill-equipped to make their own jurisdictional determinations and must hire outside consultants to secure necessary permits and approval. This takes time and money. Delays often lead to greater risks and higher costs, which many developers would rather avoid given tight budgets and timeframes. Onerous permitting liabilities could delay or eventually kill a real estate project. If the rule is finalized in its current form, a home builder's ability to sell, build, expand, or retrofit structures or properties will suffer notable setbacks, including added costs and delays for development and investment.

This will rule will leave home builders at the mercy of the agencies. Builders will have to request a jurisdictional determination from the agencies to ensure they are not disturbing land near an aggregated water. Consequently, an increase in the number of jurisdictional determination requests, across all industries, will result in greater permitting delays as the agencies are flooded with paperwork.

In addition, many federal statutes tie their approval/consultation requirements to those of the CWA, i.e. if one has to obtain a CWA permit, he/she must also obtain other permits. More federal permitting actions will trigger additional statutory reviews – by agencies other than the permitting agency – under laws including the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Project proponents do not have a seat at the table during these additional reviews, nor are consulting agencies bound by a specific time limit. These federal consultations are just another layer of red tape that the federal government has placed on small businesses, and it is doubtful the agencies will be equipped to handle this inflow.

Impacts on State and Local Governments

While many aspects of the CWA are vague, it is clear that Congress intended to create a partnership between the federal agencies and state governments to protect our nation's water resources. Congress states in section 101 of the CWA that "[f]ederal agencies shall cooperate with state and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." Under this mandate, there clearly must be a point where federal authority ends and state authority begins. The rule proposed by the agencies blatantly ignores this history of partnership and fails to acknowledge that there are limits on federal authority.

States have adequately regulated their own waters and wetlands for years. States take their responsibilities to protect their natural resources seriously, and do not need the federal government to assert jurisdiction. In fact, my home state of Louisiana has a robust mitigation program that requires a 1:1 replacement of impacted wetlands for all mitigation projects in order to achieve a goal of "no-net-loss" of wetland acreage. In addition, there are already three Louisiana laws that establish wetlands protection and restoration efforts throughout the state. This illustrates that Louisiana takes its responsibility to protect its natural resources seriously and does not need the federal government to regulate every minor pond or ditch. Louisiana's is not unique; most states are protecting their natural resources more aggressively than when the CWA was enacted.

In addition, if this rule is finalized it will slow housing production, which will have an adverse effect on state and local economies. Buyers of new homes and investors in rental properties add to the local tax base through business, income and real estate taxes, and new residents buy goods and services in the community.

NAHB estimates the first-year economic impact of building 100 typical single-family homes includes $28 million in wages and business profits, $11.1 million in federal, state and local taxes, and 297 jobs.

In the multifamily sector, the impact of building 100 typical rental apartments includes $10.8 million in wages and business profits, $4.2 million in federal, state and local taxes and 113 jobs.

Conclusion:

In crafting the Regulatory Flexibility Act, Congress clearly intended for federal agencies to carefully consider the proportional impacts of federal regulations on small businesses:

> It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulations. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.[12]

Unfortunately, the EPA has completely skirted these requirements all too often. EPA clearly views RFA compliance as a step best ignored in the rulemaking process. This rule will have a significant impact on small businesses nationwide, which the agencies choose to ignore.

[12] U.S.C., sections 601–612

I am at a loss as to why the agencies refuse to give small businesses a seat at the table to discuss these impacts. I request that the agencies start over and develop a more meaningful and balanced rule that respects the spirit of the RFA.

Fortunately, there are solutions. Last week, the House of Representatives passed legislation that will force the agencies to withdraw this rule, go back and consult with state and local governments, conduct meaningful discussions with small business stakeholders, and produce an accurate cost-benefit analysis.

The agencies could then re-propose an updated rule. And in the Senate, recently introduced legislation (S. 1140) by Senators John Barrasso (R-WY), Joe Donnelly (D-IN), Jim Inhofe (R-OK), Heidi Heitkamp (D-ND), Pat Roberts (R-KS) and Joe Manchin (D-WV) accomplishes this same goal while also providing the agencies with some guidance on how to identify a jurisdictional water.

We strongly urge the Senate to act quickly to prevent the agencies from finalizing this flawed rule. Enacting the Senate bill gets us back on track to where we need to be, which is establishing a workable and constitutional definition of Waters of the United States.

Thank you again for the opportunity to testify today.

Chairman VITTER. Thank you very much, Mr. Noel.

Now, we will hear from Elizabeth Milito with NFIB. Welcome.

STATEMENT OF ELIZABETH MILITO, SENIOR EXECUTIVE COUNSEL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. MILITO. Thank you very much, Chairman Vitter and Ranking Member Shaheen, for inviting me to participate in the hearing today.

The National Federation of Independent Business is very appreciative of the committee's interest in this rule and your examination of what we believe was a failure by two federal agencies to comply with the Regulatory Flexibility Act. I would like to commend the work that SBA's Office of Advocacy has done on this rule and I would also like to especially thank Mrs. Maulsby and Mr. Noel for coming here and making the trip here to Washington to testify today.

The agencies have proposed to change the Clean Water Act's definition for waters of the United States. Though traditionally limited to navigable waters and adjacent waters, this new proposal would classify land as waters of the United States if, at any point during the year, they have any water overflow. The new rule would bring seasonal streams, ponds, ditches, depressions in fields, and large puddles into the Clean Water Act's jurisdiction.

What does this mean for a small business owner? Well, if EPA and the Army Corps assert jurisdiction over your land, it will be essentially impossible, or at least tremendously expensive, to do anything with your land. This means you will not be allowed to alter land formations, which prevents land owners from digging or excavating on their properties or even laying gravel.

While it is possible to obtain a special permit to begin using portions of land covered by the Clean Water Act, these permits are extremely expensive. Clean Water Act permits can cost tens of thousands of dollars, if not more. A major U.S. Supreme Court decision from 2006 cited the average cost at $270,000. And, there are inevitably long waits for permit processing with no guarantee that your permit will be approved. But, proceeding without a permit could be ruinous. The penalties for violations of the Clean Water Act can be up to $37,500 per day.

NFIB and other small business stakeholders firmly believe that the agencies did not adequately consider the impact of this proposed rule on small businesses and, therefore, failed to meet their legal obligations under the RFA.

EPA and the Corps is alleging that since there is a simple definition change, there are no major costs directly imposed on small businesses. But, as I have already noted, there are certainly costs directly imposed on small businesses through the permit process and other compliance requirements. In addition, the proposed rule makes it clear that many waters will need to be determined on a case-by-case basis, therefore providing little, if any, additional certainty. While multinational corporations with tremendous capital resources can obviously afford the permitting costs, most small businesses cannot. Usually, their only option is to swallow their losses and forego any development plans.

In addition to the direct economic consequences on small businesses, the proposed rule will also have indirect adverse impacts on firms. Even in the absence of an affirmative assertion of Clean Water Act jurisdiction, landowners are going to be more hesitant to engage in development projects or make other economically beneficial uses of their property if the proposed rule is allowed.

Landowners are aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. NFIB already receives questions and concerns from small business owners who are worried about whether or not the agencies have jurisdiction over their land, and we expect to hear from many more concerned individuals if the rule is finalized. Indeed, under the proposed rule, a landowner may have legitimate cause for concern if at any point during the year, as Mrs. Maulsby indicated, any amount of water rests or flows over a property.

And, contrary to the agency's assertions, the proposed rule will do little or nothing to make Clean Water Act jurisdiction clearer or more certain for property owners. The reality is that landowners will have to seek out experts and legal counsel, which gets costly very quickly, before developing on any segment of land that occasionally has water overflow. And, the only way to have real clarity is to seek a formal jurisdictional determination from the agencies, which is going to cost even more money and lead to even more delays, delays which might cause a bank to pull financing on a project.

In short, this proposed rule will be a boon for environmental consultants, and potentially lawyers, too, but it is going to be a bust for small businesses.

In closing, I would like to underscore NFIB's frustration with the agencies' disregard for their statutory obligation under the RFA. We believe the agencies should acknowledge that the proposed rule will have a significant economic impact on a substantial number of small businesses. Withdraw the proposed rule and propose a new rule only after they have performed an initial Regulatory Flexibility Act analysis and convened a Small Business Advocacy Review Panel.

Thank you again for the opportunity today. We remain eager to work with members of the committee on this issue. Thank you.

[The prepared statement of Ms. Milito follows:]

Testimony of Elizabeth Milito

Senior Executive Counsel, NFIB Small Business Legal Center

Before the

U.S. Senate Committee on Small Business and Entrepreneurship

An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses

May 19, 2015

National Federation of Independent Business (NFIB)
1201 F Street, NW Suite 200
Washington, DC 20004

Dear Chairman Vitter and Ranking Member Shaheen:

The National Federation of Independent Business (NFIB) appreciates the opportunity to submit this testimony to the Committee on Small Business and Entrepreneurship for the hearing entitled "An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses." NFIB is the nation's leading small business advocacy organization representing over 350,000 small business owners across the country, and we thank you for the opportunity to provide our perspective on this issue. NFIB represents small businesses in every region and every industry in the country. Accordingly, NFIB has a unique insight into the concerns of the small business community, and can speak with authority on these concerns.

NFIB applauds the Committee for having this hearing today. We note at the outset that the proposed rule to define "waters of the United States" under the Clean Water Act (CWA) was jointly submitted, by the Environmental Protection Agency and the U.S. Army Corps of Engineers (the Agencies), for publication in the *Federal Register* on April 21, 2014. In that publication, the Agencies certified that the proposed rule will not have a significant adverse impact on the small business community. But as explained in this testimony, this certification is patently false. Moreover, it is contravened by the Agencies' administrative rulemaking record.

Contrary to the Agencies' assertions, the proposed rule will have a tremendous, direct, and immediate effect on many small businesses across all sectors of the economy. NFIB is concerned that the proposed rule represents an unprecedented jurisdictional land-grab, which will affect the rights of private landowners—including many small businesses. As such, NFIB believes that the Agencies have ignored their statutory obligations—under the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA)—requiring the Agencies to seriously consider the economic impact of the proposed rule on the small business community.

The Agencies Have Failed to Comply with the Regulatory Flexibility Act

NFIB believes the Agencies have failed to meet their statutory obligations under the RFA and SBREFA. Accordingly, NFIB believes the Agencies should (1) acknowledge that the proposed rule will have a significant economic impact on a substantial number of small businesses; (2) withdraw the proposed rule; and (3) wait to propose a new rule until the Agencies have considered less burdensome alternative interpretations of the pertinent CWA jurisdictional provisions.

The RFA and SBREFA Require the Agencies to Seriously Consider Economic Impacts

The RFA and SBREFA were enacted to address an unfortunate reality: regulations usually impose disproportionate costs on small businesses. Accordingly, the RFA and SBREFA require that federal agencies must seriously consider whether a proposed regulation will have a significant economic impact on a substantial number of small businesses before finalizing the rule. If an agency should determine that there will likely be significant adverse impacts, the agency is then required to consider less burdensome alternatives consistent with the language of the statute the agency has been charged with enforcing. Alternatively the agency might certify that there will be no significant adverse impact on the small business community, and forgo any further analysis.

Unfortunately, we note that federal agencies are all too quick to certify that regulatory proposals will not impact small business, or that the impacts will not be significant. This is a serious problem and unfortunately courts typically rubberstamp these certifications so long as they are not "arbitrary or

capricious." This is an extraordinarily low bar for the certifying agency and may explain why federal agencies all too often include conclusive language—with little or no analysis—certifying that proposed rules will not have significant adverse impacts.

For this reason, NFIB submits that Congress should consider measures to put more teeth in the RFA and SBREFA. We believe that strengthening these laws would have prevented the Agencies from ignoring their requirements under the RFA. Specifically, Congress should require agencies to account for both direct and reasonably-foreseeable indirect costs for the purposes of the RFA. This requirement would provide for a fairer analysis of a proposed regulation's costs and benefits.

In any event, NFIB maintains that the current forms of the RFA and SBREFA should be understood as imposing an affirmative requirement to seriously consider the economic impact of the proposed regulation. Unfortunately, the Agencies appear to have given short-shrift to this requirement in the present case. In this instance, the Agencies have proposed a rule that will have clear significant economic impacts on many small businesses throughout the country, but the Agencies have certified that there will be no adverse impact. The Agencies base this certification on the errant assertion that the proposed rule will actually narrow the CWA's jurisdiction—an assertion that the record contradicts.

The proposed regulation will plainly expand the CWA's jurisdictional reach as a matter of law. And as a matter of fact, the Agencies acknowledge elsewhere in the record that the proposed regulation will result in at least a three percent increase in jurisdictional wetlands. NFIB believes the three percent estimate is far too conservative; however, in any event, it patently contradicts the Agencies' RFA certification that the rule will not hurt small business.

The proposed rule will have direct adverse impacts on many small businesses

The Agencies are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties—including many owned by small businesses. As a result, the proposed rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial uses of his or her land once it is considered a jurisdictional wetland. And if an owner proceeds with a project on a portion of land that might be considered a wetland, the owner faces the prospect of devastating fines—up to $37,500 per day.

Consequently, most landowners—especially small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. Indeed, the Supreme Court noted, in *Rapanos v. United States*, that the average CWA permit costs more than $270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford

necessary permits, nor legal representation to challenge improper jurisdictional assertions—lawsuits challenging these assertions are fact intensive and extremely costly to litigate.

The proposed rule will also have indirect adverse impacts on many small businesses

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. And now that the Agencies have proposed this rule, it is apparent that they are taking an even more aggressive approach to jurisdictional issues—a signal that landowners can expect greater enforcement actions in the future.

NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the proposed rule is finalized. Indeed, under the proposed rule a landowner may have legitimate cause for concern if—at any point during the year—any amount of water rests or flows over a property.

And contrary to the Agencies' assertions, the proposed rule will do little or nothing to make CWA jurisdiction clearer for most properties. The reality is that landowners will have to seek out experts and legal counsel—which gets costly quickly—before developing on any segment of land that occasionally has water overflow. And, the only way to have definitive clarity is to seek a formal jurisdictional determination from the Agencies, which costs more money, further delays development plans and may cause financing to disappear.

Of course, in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. Indeed, they face ruinous fines of up to $37,500 per day if they errantly begin filling in—or dredging—land that the Agencies believe is a jurisdictional wetland. And for this reason any property that might be viewed as containing a jurisdictional wetland will be greatly devalued. In addition, even if the property owner is found to be in the right, he or she may use all their assets fighting to prove this fact.

The Proposed Regulation Radically Expands CWA Jurisdiction

NFIB views the proposed rule as a jurisdictional land-grab. It should be remembered that the Agencies are not writing on a blank slate here. The Supreme Court has made clear that there are constitutional limits on the jurisdictional reach of the Clean Water Act. The Agencies have been repudiated for overreaching in the past, and will be again if the proposed regulation is understood as reaching beyond the constitutional limitations recognized in *Rapanos*.

There are undoubtedly grounds for disputing how far CWA jurisdiction reaches on a case-by-case basis; however, there is no question that *Rapanos* set the outer-limits. The Agencies cannot exceed those limits any more than Congress could. And for several reasons, NFIB believes the proposed regulation goes beyond what *Rapanos* allows. For the reasons set forth below, we maintain the proposed regulation is inconsistent with *Rapanos* and should be amended or abandoned entirely.

(1) The Proposed Regulation Lowers the Threshold for Proving Navigability

The proposed regulation defines "traditional navigable waters" as any waters that are used for commerce or that could be used for commerce in the future. But the proposed regulation would effectively expand CWA jurisdiction by lowering the threshold for demonstrating the potential for navigable use in commerce. Specifically, the proposed regulation provides that the potential for commercial navigation "can be demonstrated by current boating or canoe trips for recreation or other purposes." While the proposed regulation suggests that the Agencies' assessment must take into account physical characteristics of the waterway, it ultimately provides that the water will be viewed as "traditional navigable waters" if there is any evidence that a watercraft can navigate the waterway. This would seemingly justify the Agencies treating any waterway as "traditional navigable water" if any party can succeed in a single downstream trip—an approach that we think is far too easy to satisfy.

(2) The Proposed Regulation Disregards Whether Interstate Waters are Navigable

The proposed regulation inappropriately treats all interstate waters as "waters of the United States," regardless of whether they are in fact navigable, or even "connect[ed] to such waters." But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven in fact.

(3) The Proposed Regulation Distorts Justice Kennedy's 'Nexus Test'

The proposed regulation expands CWA jurisdiction by distorting Justice Kennedy's "significant nexus test," such that it will liberally justify jurisdictional assertions beyond what the test would allow for if properly applied. The result is an expansion of CWA jurisdiction. It does so in three ways. One way is that the proposed regulation misstates the significant nexus test by replacing the conjunctive word "and" with the disjunctive word "or," when listing the different factors to be considered in determining whether the subject wetland has a sufficient nexus to traditional navigable waters. The proposed regulation also seeks to lower the threshold for satisfying the significant nexus test by stating that the test will be satisfied if it can be demonstrated that the chemical, physical or biological effect on jurisdictional waters is more than "speculative or insubstantial." Finally, the proposed regulation changes the significant nexus test by expanding the definition of "region."

(4) The Proposed Regulation Asserts Jurisdiction Over Anything with a High Water Mark

The proposed regulation provides that any "natural, man-altered, or man-made water body" with an ordinary high water mark will be considered a tributary. This requires the Agencies to assert jurisdiction over practically any land over which water occasionally flows. But, both *Rapanos* tests reject such an expansive interpretation of CWA jurisdiction.

(5) The Proposed Regulation Places the Burden on the Landowner to Disprove Jurisdiction

The most fundamental problem is that the proposed regulation operates so as to create a presumption of jurisdiction—a presumption that may not bear out in practice. This is highly problematic because the burden should not be on the landowner to disprove CWA jurisdiction. The burden should rest on the Agencies to prove the existence of a "significant nexus" in any given case.

Only Congress can fix the CWA's jurisdictional pitfalls

As Justice Alito noted in the *Sackett v. EPA*, the "reach of the Clean Water Act is notoriously unclear." This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. But, the exact reach of the CWA remains a murky question—so much so that some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland.

While it is commendable that the Agencies apparently seek to resolve some of the confusion over the jurisdictional reach of the CWA in the proposed regulation, our view is that only Congress can fix this problem. The proposed regulation would resolve the vast majority of jurisdictional disputes by applying categorical rules, which will result in expansive assertions of jurisdiction. But *Rapanos* makes clear that categorical assertions of jurisdiction must be rejected. It is simply beyond the authority of the Agencies to expand CWA jurisdiction through the rulemaking process in a manner that conflicts with the jurisdictional tests set forth in *Rapanos* and her progeny.

Therefore, NFIB believes action by Congress is necessary to ultimately provide the type of clarification that would allow small business owners to operate without fear of unknowingly violating the CWA.

Conclusion

NFIB greatly appreciates the efforts of the Committee to hold the Agencies to account on its requirements under the RFA.

Thank you again for the opportunity to provide this testimony. NFIB remains eager to work with members of the Committee to ensure that the Agencies operate within the bounds Congress clearly intended. We also look forward to working with the Committee to help ensure that the Agencies adhere to their responsibilities under the RFA in all of its current and future rulemakings.

Chairman VITTER. Thank you, Ms. Milito.

And now, we will hear from Benjamin Bulis with the American Fly Fishing Trade Association. Welcome.

STATEMENT OF BENJAMIN BULIS, PRESIDENT, AMERICAN FLY FISHING TRADE ASSOCIATION

Mr. BULIS. Thank you. Good afternoon, Mr. Chairman and members of the subcommittee. I appreciate the opportunity to provide testimony in support of the Clean Water Act today.

I had the good fortune to be born and raised in the beautiful State of New Hampshire. I personally have fished in the United States and around the world, but the rivers and streams of New Hampshire will always stay close to my heart. Now, I have the great fortune to live in Bozeman, Montana, which one could argue is the epicenter of the fly fishing industry.

AFFTA represents the business of fly fishing, which includes manufacturers, retailers, outfitters, and guides across the nation who all share the same bottom line, furthering the sport and industry of fly fishing. This cannot be accomplished without clean water and vibrant fisheries habitat. The formula that drives AFFTA is very simple. Access to healthy habitat creates recreational opportunity that drives economic activities and jobs.

Our industry provides the waders, rods, guides, and boats that 47 million sportsmen and women utilize every time they step foot in their favorite piece of water. Their quality of experience, and, thus, our return sales to enhance those days, is dependent on access to clean water.

I am here to express our support for the Army Corps of Engineers and the Environmental Protection Agency's efforts to restore protections for our nation's headwaters, streams, and wetlands under the Clean Water Act. Simply put, the draft clean water rule is well crafted and appropriate. It should be allowed to move through the federal rulemaking process with the support of Congress, and here is why.

The small waters to which this important draft rule applies are the lifeblood for many of our country's prized fisheries. The health of these headwaters sets the tone and benefits for all waters downstream, supporting and creating even the backbone of our nation's marine resources. They flow into rivers, streams, and lakes that provide the foundation of our industry, thus eventually concluding the voyage in our oceans. Our industry's viability depends on intact watersheds, cold, clean rivers and streams, and healthy, fishable habitat.

Given that fishing in America supports approximately 828,000 jobs, results in nearly $50 billion annually in retail sales, and has an economic impact of about $115 billion every year, it stands to reason that the health of our nation's waters is vital to the continued success of our industry and to the health of America's economy.

We urge you to allow the rulemaking process to continue unimpeded. Carefully review the final rule when it comes out and then determine what, if any, legislative action is warranted.

We owe it to the more than one million Americans who took the time to comment on the proposal to allow the process to reach a conclusion. More than 80 percent of those who commented on the

proposal were in favor of it. Such strong support for clean water and healthy watersheds is what our members experience every day as we interact with our customers across the nation.

If we fail to protect our headwaters, streams, and wetlands, we may destroy the $200 billion annual economy of the hunting and fishing industry, as well as put 1.5 million people out of work. Of those 1.5 million jobs, many are located in rural areas with limited economic opportunity and few other employment options.

In recent years, participation in fly fishing has grown. We are seeing robust interest in our sport and it is translating to our sales, to the numbers of employees we hire right here in America, and to the health of brick-and-mortar retailers all over the country.

The fly fishing industry is the epitome of small business. The sustainable domestic industry is dependent on clean, fishable water.

And, again, on behalf of my Association and our members, I appreciate the opportunity to testify today, and I would also like to thank the committee and staff for their dedication to our nation. Thank you.

[The prepared statement of Mr. Bulis follows:]

affta

AMERICAN FLY FISHING TRADE ASSOCIATION

Statement of Benjamin H. Bulis, President and CEO of American Fly Fishing Trade Association (AFFTA), for the Senate Committee on Small Business and Entrepreneurship hearing entitled, "An Examination of Proposed Environmental Regulation's Impacts on America's Small Businesses", May 19, 2015.

Good afternoon, Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to provide testimony in support of the Clean Water Act at the hearing today. I had the good fortune to be born and raised in the beautiful state of New Hampshire. I have fished around the U.S. and the world, but the rivers and streams of New Hampshire will always stay close to my heart. Now I have the great fortune to live and work in Bozeman, Montana, and the fishing is not too bad there either, as you may have heard!

AFFTA represents the business of fly fishing which includes manufacturers, retailers, outfitters and guides across the nation, who all share the same bottom line: furthering the sport and industry of fly fishing. This cannot be accomplished without clean water and vibrant fisheries habitat. The formula that drives AFFTA is very simple: Access to healthy habitat creates recreational opportunity that drives economic activity and jobs.

Our industry provides the waders, rods, guides and boats that 47 million sportsmen and women utilize every time they step foot in their favorite piece of water. Their quality of experience, and thus our return sales to enhance those days, is dependent on access to clean water.

I am here to express our support for the Army Corps of Engineers and the Environmental Protection Agency's efforts to restore protections for our nation's headwater streams and wetlands under the Clean Water Act. Simply put, the draft clean water rule is well crafted and appropriate, it should be allowed to move through the federal rulemaking process with support of Congress.

Here's why. The small waters to which this important draft rule applies are the lifeblood for many of our country's prized fisheries. The health of these headwaters sets the tone and benefits for all waters downstream, supporting and creating even the backbone of our nation's marine resources. They flow into rivers, streams and lakes that provide the foundation of our industry, thus eventually concluding the voyage in our oceans--our industry's viability depends on intact watersheds, cold, clean rivers and streams and healthy, fishable habitat.

Given that fishing in America supports approximately 828,000 jobs, results in nearly $50 billion annually in retail sales and has an economic impact of about $115 billion every year (*Sportfishing in America an Economic Force for Conservation*, American Sportfishing Association, 2013), it stands to reason that the health of our nation's waters is vital to the continued success of our industry, and to the health of America's economy. We urge you to allow the rulemaking process to continue unimpeded, carefully review the final rule when it comes out, and then determine what, if any, legislative action is warranted. We owe it to the more than one million Americans who took the time to comment on the proposal to allow the process to reach a conclusion. More than 80% of those who commented on the proposal were in favor of it. Such strong support for clean water and healthy watersheds is what our members experience every day as we interact with our customers across the Nation.

If we fail to protect our headwater streams and wetlands, we may destroy the $200 billion annual economy of the hunting and fishing industry, as well as put 1.5 million people out of work. Of those 1.5 million jobs...many are located in rural areas with limited economic opportunities and few other employment options. Some of the best trout water in the lower 48 is located here in Montana, where our entire state population just recently broached a million residents. Because of access and quality of those trout waters...world-wide fly fishing companies such as Simms, RL Winston, Montana Fly Company and Bozeman Reel Company have decided to set up shop in our relatively rural location...and employ hundreds of people in the process. If those jobs are compromised due to a lack of clean water, what options do those employees have in our rural economies across the nation?

AFFTA members from the White Mountains of New Hampshire, the Coast of Louisiana, the Olympic Peninsula in Washington, the Florida Key, the Front Range of Colorado and the remote outfitters in Alaska are all funding their local economies by clean water and healthy fisheries. From the flies to the rods to the rain jackets for the guides rowing clients down the river...none would be possible without clean water.

In recent years, participation in fly fishing has grown. We are seeing robust interest in our sport and it is translating to our sales, to the numbers of employees we hire right here in America, and to the health of brick-and-mortar retailers all over the country. The fly fishing industry is the epitome of small business, the sustainable domestic industry is dependent on clean fishable water.

But, in addition to being acutely interested in the health of our watersheds, we are also concerned that blocking this rulemaking process could turn back the clock on the progress our nation has made since the Clean Water Act was put into place more than 40 years ago. Today, rivers that were once polluted are home to remarkable runs of steelhead, salmon and brown trout. Streams that were once uninhabitable for native brook trout are now home to robust populations of these prized fish. What's more, our country's drinking water is healthier and safer.

Please consider the present state of our watersheds before interfering in a proven process that has generated more than 800,000 comments from the public in support of this rule. While we understand that politics these days can be tumultuous and rancorous, we strongly encourage you not to play politics with clean water.

Again, on behalf of AFFTA, I appreciate the opportunity to testify today and I'd like to also thank this committee and staff for their continued service to our Nation.

Sincerely,

Benjamin H. Bulis

Chairman VITTER. Thank you all very much. We will now go to questions.

Let me start by asking each of you to respond, but as concisely as you can, and the question is this, not whether you are in favor of clean water, not whether you think the proposed rule is a good one, but whether you think the proposed rule would have a significant impact on a substantial number of small businesses, which is the small business issue we are talking about in terms of following the law. Could each of you respond, what you think about that.

Mrs. MAULSBY. Yes. From the farmers' standpoint, it would have a huge impact on not just my farm and farms across Iowa, but farms and ranches across the whole country. It is a very serious issue that we are all very concerned about.

Chairman VITTER. Okay. Mr. Noel.

Mr. NOEL. Absolutely. We drain our neighborhood sometimes with roadside ditches and we have to put driveways over them. If we are forced to go get permits to put driveways in, it will obviously slow down the production of homes and houses for people.

Chairman VITTER. All right. Ms. Milito.

Ms. MILITO. And, yes, I would agree that it will have a substantial impact, and I think the agencies' own administrative record also shows that it will, too. I mean, it is going to increase jurisdiction of the Clean Water Act by about three percent.

Chairman VITTER. Okay. Mr. Bulis.

Mr. BULIS. Yes. I think without this rule, it will have a significant impact on our industry. As I said, the 1.5 million jobs that are associated with the hunting and fishing industry, those could be at jeopardy.

Chairman VITTER. Okay. I appreciate your answer to a different question, but let me restate my question. Do you think this proposed rule will have a significant impact on a substantial number of small businesses?

Mr. BULIS. You know, I cannot speak for these other businesses. I can only speak for the fly fishing industry, and I am not sure how they would affect their businesses.

Chairman VITTER. Okay. Ms. Maulsby, in general, how do you think the agricultural community has been engaged and their concerns have been incorporated into the substance of the proposed rule?

Mrs. MAULSBY. One thing that we were disappointed about was that there were no hearings held in Iowa, and we would—just like Senator Ernst said, we would love to have EPA come out, and lawmakers, too. Our farms are open for tours. We would love to have people come out and see what we are doing on our land for conservation, the steps we are taking to keep the land more sustainable, and it is not just me. I have got lots of friends and neighbors that feel the same way. So, we would love to have people come out and actually see what is going on with conservation on the ground.

Chairman VITTER. Okay. Mrs. Maulsby and Mr. Noel, let me ask you this. You all have brought up situations like temporary standing water ponds and roadside ditches and small amounts of water that driveways may go over, drainage ditches. Now, I know in a lot of these meetings and conversations, EPA and the Corps say, oh,

no, no, no. We are not talking about that. Is there anything we can point to and read in the proposed rule that makes that very clear?

Mrs. MAULSBY. No. That is the confusion. That is the uncertainty. There are no clear-cut answers to that type of information, and it is just that uncertainty that is so detrimental to the farm community and one of the things we are very concerned about with this proposed rule.

Chairman VITTER. Mr. Noel.

Mr. NOEL. Yes, Senator Vitter. It is disconcerting when you ask the Army Corps of Engineers to come out and give you a determination, and they are on a sugarcane farm where they have rows, and they are low between, right, and that tells me that that is wetlands, jurisdictional. And, then another Army Corps of Engineers comes out to make a determination and does not say it is. So, there is—you cannot plan to do developments and homes, et cetera, based on how this rule is written. You will have to hire a consultant. You will have to have the Corps come out and make a determination, and it delays everything——

Chairman VITTER. And, that determination——

Mr. NOEL [continuing]. Years.

Chairman VITTER [continuing]. Could be different every time.

Mr. NOEL. Absolutely, and it just—there is no way to run a small business not knowing what the rules are.

Chairman VITTER. Right.

Mrs. MAULSBY. Senator, I would add, too, that timing is everything in agriculture, and if you do not have the answers you need, your pests can get out of control quickly, your crop can be torn out right from under you if things cannot happen in a timely manner.

Chairman VITTER. Sure.

Mrs. MAULSBY. So, it is a very big issue.

Chairman VITTER. Okay. And, Ms. Milito, let me ask you. If an RFA process had been used, what could that have done positively in terms of avoiding some of these concerns?

Ms. MILITO. I think the consideration of less costly alternatives is the most important thing that the RFA process does and can do, as Mr. Maresca hit on. Thank you.

Chairman VITTER. Okay. Thank you very much.

I will turn to Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman, and thank you all very much for being here. Your testimony was very helpful.

And, Mr. Bulis, I did not know until we got your biography that you are a New Hampshire native, and I appreciate your talking about fly fishing in New Hampshire. We think we have some great spots to do that. And, obviously, the outdoor industry is a very big economic contributor, not just to New Hampshire and Montana, but to the entire country. And, so, making sure that we have clean water that benefits everyone is very important.

And, I am sure that all of you would agree with that. So, just to be clear, I do not assume that anybody here is suggesting that we should repeal the Clean Water Act. That is not what the concern is.

So, let me go back. I thought, Mr. Noel, you were very helpful in terms of talking about the kinds of rules that would be helpful in providing some certainty for small businesses. As we all know,

this is a proposed rule. It has not been finalized yet. And, so, in thinking about not just the process that was followed—I appreciate the concerns that have been raised about that, and I share some of those—but also in terms of trying to do a final rule that would provide more certainty for businesses, more understanding and clarity for businesses, would you talk a little bit more about that, Mr. Noel, and what you would like to see?

Mr. NOEL. Certainly. You know, there was not very much clarity before.

Senator SHAHEEN. Right, which is part of the problem.

Mr. NOEL. Which is part of the problem. And, in the effort to clarify, they have grossly expanded it to cover areas that were, in our estimation, not determined to be waters of the United States, certainly like roadside ditches or ponds, temporary ponds.

You know, with the work toward trying to come up with some very clear definitions, I mean, there was plant life, there was water on the soil, et cetera, that kind of led us in a direction to help do that. We thought they would be a little more specific for that as opposed to the rule that came out that said, basically, call us if you own a piece of land and we will tell you whether it is wetlands or not, based on whoever shows up that day.

They need to define it in a way that any citizen that reads the rule can walk out there and say, yes, this is definitely wetlands. Where I live, it is clear what wetlands look like because we are surrounded by them in New Orleans and the South Louisiana area. But, the roadside ditches, flood plains, which we are also dealing with an Executive Order that expands the flood plains. And, so, it makes it very difficult to decide to buy a piece of land and develop when you have no idea what it is going to cost you to mitigate it, and the mitigation costs are not in the economic analysis, are significant.

Senator SHAHEEN. And, Ms. Milito, can you share your thoughts about what would be helpful to small businesses in looking at any final rule and how, short of repealing what is being proposed, what would be helpful to small businesses in providing clarity?

Ms. MILITO. I think—Senator, thank you for the question, too, and going back to your point, too, about the Clean Water Act itself, yes, I am not here to say that members of NFIB do not like clean water. What they do not like, and what we do not like about this rule in particular, is the agencies', what I would say is kind of flagrant disregard for another law, another federal law, the Regulatory Flexibility Act, and what that law encompasses, and particularly the Small Business Advocacy Review Panel and the opportunity for the two agencies to hear from business owners, like Mr. Noel and like Mrs. Maulsby, in a very thoughtful and methodical way. So, not a big open forum where you have 100 business owners, but to hear specific, industry-specific things. So, to hear from the home builders with specific proposals.

Senator SHAHEEN. And, I am not debating the process——

Ms. MILITO. Yes.

Senator SHAHEEN [continuing]. And how that worked. I am trying to get a better sense from you of what you would like to see in terms of a final rule that would provide more clarity for businesses.

Ms. MILITO. And the jurisdictional issue, which NFIB addressed in a letter to the agency, too, which I would be very happy to provide the committee in addition to a separate letter we did on the RFA, I would be happy to do that, too. But, I will just——

Senator SHAHEEN. That would be very——

Ms. MILITO. Yes, absolutely. That might be——

Senator SHAHEEN [continuing]. Very appreciated, if you would——

Ms. MILITO. Yes.

Senator SHAHEEN [continuing]. Share that, and I am sure the Chairman will share that with the members.

Ms. MILITO. Yes. Yes. Absolutely.

Chairman VITTER. Sure. Absolutely. Without objection.

[The information of Ms. Milito appears in the Appendix on page 66.]

Ms. MILITO. And, just going back, too, that we do feel, overall, there was an over-reach and going beyond what Congress intended with the Clean Water Act as far as what the agency's authority is.

Senator SHAHEEN. So, your objection is really the proposed rule. It is not that it does not provide clarity, it is more that you think it expands what is under existing law and that——

Ms. MILITO. That is part of——

Senator SHAHEEN [continuing]. NFIB does not like that.

Ms. MILITO. Our objection is partly with regards to the jurisdictional issue, but also with regards to the RFA analysis, or lack thereof, that was done by the agencies.

Senator SHAHEEN. Okay. Thank you.

Ms. MILITO. Thank you.

Senator SHAHEEN. That is helpful.

And, Mr. Bulis, I am actually out of time, but I just wanted to give you the opportunity to comment. I assume—you talked very eloquently about the importance of our streams and rivers and to the outdoor industry. I assume that there are—we can continue to protect those waters and still come up with some rule that would do that, that could provide some clarity. Have you discussed that within your association and does that seem like something that is reasonable to expect?

Mr. BULIS. Yes. I mean, we have discussed it, and I think the biggest thing we need to come up with is a balance, is a fair balance, where the—you know, we do not put our environment at risk, but we also do not put small business at risk. I think that is the most important thing.

Senator SHAHEEN. That is a very good way to say it. Thank you. Thank you all.

Chairman VITTER. Thank you. Absolutely.

Senator Fischer.

Senator FISCHER. Thank you, Mr. Chairman, and welcome to all of you. It is such a pleasure to have you here today.

Earlier this year, I was able to chair a field hearing in the State of Nebraska, in Lincoln, Nebraska, on waters of the U.S. and the impact on every Nebraskan that those proposed rules will have. We were very fortunate on one of the panels to have a home builder from the State of Nebraska, and he made a comment, Mr. Noel,

that really brought this home to me, and, again, the impact that it has.

In Nebraska, we have a broad, broad coalition of organizations, of people who are very, very concerned about the impact of these regulations, and I always smile and say, as a rancher, it is the usual suspects, people in agriculture who have deep concerns, but it is also home builders. It is cities, it is counties, the cost to taxpayers that these proposed rules are going to have. It is our natural resources districts, all of these folks have come together in opposition—in opposition to this overreach, I believe, by the federal government.

But, the home builders said that, right now, 25 percent of the current cost of a new home is due to current regulations. That puts an American dream out of reach for most Americans. You know, it is an American dream to purchase a home, and we already are looking at 25 percent of the cost being due to regulations. What is going to be the impact of these proposed rules and more and more and more coming down from the federal government?

Mr. NOEL. Well, great question. We struggle now to get an entry home built for a first-time homebuyer because of the regulations that we deal with, and, you know, they come from a multitude of areas—local government, state government, and certainly federal government.

If any—if this rule was to go into effect and we had to spend additional money to get jurisdictional issues taken care of, it surely would put the first-time buyer out of reach of a single-family home because of the——

Senator FISCHER. Yes. We are seeing more apartments built than homes.

Mr. NOEL. Right.

Senator FISCHER. You know, so we see the effect, I think, of regulations right now. But, that, to me, was very telling.

Mr. NOEL. Well, and home ownership has so many benefits to the community——

Senator FISCHER. Yes.

Mr. NOEL [continuing]. And to the American society, that to become a renter nation would not be what I think is in the best interest of the folks here.

Senator FISCHER. I agree.

And, Mr. Bulis, when you talk about fly fishing, my brother was an avid fly fisherman. I am the Vice Chair of the Sportsman's Caucus here in the Senate. I happen to live in an area with pristine fly fishing, so it is not all in Montana or in New Hampshire. We have that in Nebraska, as well.

But, I believe that current regulations that we have in place seem to be doing the job. That is why we have these pristine areas. It has been said earlier, no-one wants to change the strides that we have made under the Clean Water Act. I think what many of us are concerned about is just the overreach that we see here.

And, when you mentioned the comments that had been received by the EPA, about a million comments, 58 percent of those comments, the substantive comments that were made, were opposed to the rule, and that comes from the EPA's own numbers. So, as peo-

ple really drilled down on these proposed rules, they did have deep concerns with it.

But, I guess, I would ask you, do you believe it is necessary that we continue to have those partnerships between the states and the federal government when we look at water quality and our water resources? You know, the Nebraska Department of Environmental Quality implements EPA rules now. That is a responsibility we have. And, I would also note that the water in Nebraska belongs to the people of Nebraska. It is a state resource. It is not a federal resource. It is a state resource. And, I think we manage it well. We manage it responsibly. I have a concern about that partnership and what would happen in the future and I just would like your views on that.

Mr. BULIS. You have the concern with the federal government and the state partnership?

Senator FISCHER. Yes. Yes. In the future, if the rules with waters of the U.S. go forward.

Mr. BULIS. I guess it is hard for me to comment on your particular state, but there are places across our country where we have some really bad water quality issues, Florida being one of them, from Lake Okeechobee discharges that are coming out of the Caloosahatchee and the Indian River lagoon, where we have members in those areas that, when the effluent water comes out of Lake Okeechobee, they have these huge blooms of algae that form, and there are signs that go up, do not touch the fish, do not go in the water.

I mean, we have places in Chesapeake Bay where a large, or one of the contributing factors to the decline of striped bass is because of the forage fish that are not living in those areas anymore because of the water quality.

You know, in the Gulf Coast, there are places that are coming from the Mississippi River with the effluence that is coming off and creating dead zones.

So, I think that there is a real good—there has got to be a way that the states and the federal government work together to make sure that the water is the cleanest it possibly can be for our people and our environment and the businesses.

Senator FISCHER. And I appreciated your comments about striking a balance. Obviously, I believe in a more limited federal government, and I believe that a balance is necessary, and especially for our small businesses and our taxpayers and the burdens that we are going to see on taxpayers with these regulations. So, thank you. Thank you——

Mr. BULIS. I agree with you, and I believe in the limited government reach, as well. I mean, in the State of Montana we had a reasonable and prudent speed limit, and now that is gone because of government.

Senator FISCHER. Thank you.

Chairman VITTER. Thank you all very much. We really appreciate your being here. We really appreciate your testimony.

As I mentioned, I will be following up on this issue with a resolution about the EPA and the Corps, in my opinion, flagrantly ignoring the Regulatory Flexibility Act. That Act is really important for small business. It is one of the core protections in the regulatory

process for small business. It should be one of the things this committee is all about. So, following that law is really important. So, we will follow up on that.

And, with regard to the substance of this rule, I just have a big concern, as many of you do, that there was lack of clarity. So, the agencies clarified all of that completely from their point of view, because if the question is, in the future, do the agencies have jurisdiction, the answer is going to be yes. You do not have to finish the sentence. You do not have to go on. You do not have to provide any details. The answer is yes. And, then, they will decide when and how to exercise it. Obviously, that is not clarity for you all, and I share that concern.

Senator Shaheen, any closing thoughts?

Senator SHAHEEN. Just thank you all very much for being here, and hopefully we will see a final rule that is proposed that strikes the balance that you suggested, Mr. Bulis, between protecting our water resources and making sure that small businesses are not adversely—too adversely affected. Thank you.

Chairman VITTER. Thank you very much.

With that, the hearing is adjourned.

[Whereupon, at 3:26 p.m., the committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Advocacy Waters of the United States Contacts: Small Businesses and Their Representa

- Agricultural Retail Association
- Alexander & Baldwin Inc., Hawaii
- American Chemistry Council
- American Coatings Association
- American Exploration & Mining Association
- American Farm Bureau
- American Forest & Paper Association
- American Gas Association
- American Petroleum Institute
- American Public Power Association
- American Road & Transportation Builders Association
- American Sustainable Business Council
- Asian Food Trade Association of Southern California
- Associated Builders & Contractors, Inc.
- Associated General Contractors of America
- Association of General Contractors
- Automotive Recyclers Association
- Avalon Group, Hawaii
- Axtell Commercial
- Barnes & Thornburg
- Barrick Gold, Nevada
- Beavers Bend Marina
- Bracewell & Guliani for Industrial Broiler Owners
- Brox Industries
- Buckeye Development, LLC
- Calcasieu Refining Company
- California Farm Bureau Foundation
- California Asian Chamber
- California Farm Bureau
- California Food and Ag Advocates
- California Stormwater Quality Association Monterey Regional Stormwater Program
- Carlsbad Soil & Water Conservation District
- Central Electric Power Cooperative
- Chamber of Commerce Hawaii
- Chemical Management Associates LLC

- Churchill Economic Development Authority, Nevada
- City of Farmers Branch, Texas
- Conservation Technology Information Center
- Copper Development Association
- CropLife America
- CUBE, Nevada
- Douglas County Water Resource Authority
- Edison Electric Institute
- Electric Cooperatives of Arkansas
- Environmental Health Director, City of Framers Branch, Texas
- Filipino Farmers Cooperative
- Fillmore County Roads Dept (NE)
- Flexibile Packaging Association
- Florida Department of Agriculture
- Food Marketing Institute
- Four Corners Materials
- Gary Williams Energy Corporation
- GE Corporate
- Golden Spread Electric Cooperative, Inc.
- Golden Valley Electric Association
- Golf Course Superintendents Association of America
- Greater New Orleans Economic Development
- Greshman Petroleum Company
- Hawaii Department of Agriculture
- Hawaii Cattlemen's Council
- Hawaii Department of Agriculture
- Hawaii Farm Bureau
- Herbrucks Poultry Ranch
- Hoosier Energy REC, Inc.
- Hunton & Williams LLP
- Ice Miller
- Ilokano Farms
- Industrial Minerals Association – North America and the National Industrial Sand Association
- Institute of Makers of Explosives
- International Council of Shopping Centers
- IREMP Associates

- Irrigation & Electrical Districts' Association of Arizona
- Los Angeles Chamber of Commerce
- Manzano Realtor
- McAllen Construction, Inc.
- McCandless Land & Cattle, Hawaii
- Meridian Beartrack Company
- Metropolitan Water District
- Mineral Energy and Technology
- Minnesota League of Cities Stormwater Committee
- National Agricultural Aviation Association (NAAA)
- National Association of Clean Water Agencies
- National Association of Counties
- National Association of Home Builders
- National Association of Manufacturers
- National Association of Realtors
- National Association of Realtors
- National Association of Stone and Gravel
- National Automobile Dealers Association
- National Cattlemen's Beef Association
- National Council of Farmers Cooperative
- National Federation of Independent Business
- National Grain and Feed Association
- National Home Builders
- National Industrial Sand Association
- National Mining Association
- National Oilseed Processors Association
- National Ready Mix Concrete Association
- National Rural Electrical Cooperative Association
- National Stone, Sand and Gravel Association
- National Waste & Recycling Association
- National Water Resources Association
- National Waters Resources
- National Wildlife Federation
- Natural Resources Defense Counsel
- Nevada Association
- Northwest Mining Association
- National Small Business Association

- Oglethorpe Power
- Orange County Farm Bureau
- P.J. Keating Company
- Pacific Heritage Consulting
- Passman Homes
- Pet Industry Joint Advisory Counsel
- Policy Navigation Group
- Portland Cement Association
- Environmental Concern (MD)
- Public Lands Council
- Rubber Manufacturers Association
- Sacramento Asian Chamber
- Sacramento California Farm Bureau Foundation
- Sacramento Women Chamber
- San Diego County Water Authority
- San Diego Regional Chamber of Commerce
- Santa Clarita SBDC
- Segrest & Segrest, P.C.
- Specialty Graphic Imaging Association
- SPI: The Plastics Industry Trade Association
- State of Hawaii
- State of Nevada
- SunStarLabs
- Sustainable Business Council
- Terra Verde Communities, LLC
- The Fertilizer Institute
- The Grizzle Company
- The Kilduff Company
- Tri-State Generation and Transmission Association, Inc.
- US Chamber of Commerce
- Van Scoyoc Associates, Inc.
- Venable LLP
- Vitello Consulting
- Wabash Valley Power Association
- Wahkiakum County Public Works (WA State)
- Washington Cattlemen's Association/ Lazy JF Cattle
- Waste Recycling and Technology
- Water Stewardship, Inc.
- Wolverine Power
- XcelHR

NFIB
The Voice of Small Business.

October 15, 2014

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA–HQ–OW–2011–0880 – Definition of "Waters of the United States" Under the Clean Water Act

These comments are submitted for the record to the U.S. Army Corps of Engineers and the Environmental Protection Agency (the Agencies) on behalf of the National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center in response to the notice of proposed rulemaking regarding Definition of "Waters of the United States" Under the Clean Water Act (Proposed Rule) published in the April 21, 2014 edition of the *Federal Register*.

NFIB is the nation's leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States, in varying industries that cover virtually all of the small businesses potentially affected by this proposed rule.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The Proposed Regulation purports to expand federal jurisdiction under the Clean Water Act (CWA). This should raise serious concerns for three reasons: (1) the Proposed Regulation will require the Agencies to assert CWA jurisdiction over many thousands of properties, which will therein impose heavy economic costs on property owners seeking to develop their properties, or will entirely discourage economic development; (2) the Proposed Regulation—in expanding CWA jurisdiction—will place a cloud upon the title of countless other properties, therein chilling economic development and greatly devaluing property values; and (3) federal implementation of the Proposed Regulation will result in tremendous new liabilities for the federal government and the national budget.

These comments explicitly address the Agencies' expansion of federal jurisdiction. NFIB has concurrently filed separate comments explaining how the agencies failed to meet the requirements of the Regulatory Flexibility Act.

The Proposed Regulation Expands Federal CWA Jurisdiction

Though we fully recognize the importance of the CWA's goals of eliminating pollutant discharges into the waters of the United States, we have serious objections to the Proposed Regulation because it will expand CWA jurisdiction beyond the constitutional limits recognized in *Rapanos v. United States*, 574 U.S. 715 (2006). Under the Proposed Regulation the Agencies will assert newly expanded jurisdiction over properties all across the country. We expect the actual impact of the Proposed Regulation will greatly exceed the Agencies' prediction of a mere 3% increase in jurisdictional wetlands; though we do not have a metric for offering a precise measurement of the proposed jurisdictional expansion, there is no way that its sweeping categorical rules will be so limited in effect.

As we explain in further detail, the economic impact from the Proposed Regulation's jurisdictional expansion will be severe. A landowner of modest means—especially small business owners and ordinary individuals—will be hardest hit because they lack the financial resources to challenge jurisdictional assessments and or to seek necessary permits. And it is important to remember that the assertion of jurisdiction is a virtual death-knell for an individual or small business owner wishing to make reasonable use of the property in question because the required permits are prohibitively expensive.

Only Congress Can Fix the CWA's Jurisdictional Pitfalls

As Justice Alito noted in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), the "reach of the Clean Water Act is notoriously unclear." This is undoubtedly true. The Supreme Court has addressed CWA jurisdictional questions on three different occasions. *See United States v. Riverside Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715. But, the exact reach of the CWA remains a murky question—so much so that some legal scholars contend that the CWA is unconstitutionally vague because the regulated community cannot readily determine whether a given property is, or is not, a jurisdictional wetland. *See* Jonathan Adler, *Wetlands, Property Rights, and the Due Process Deficit, Cato Supreme Court Review*, 141 (2012).

While it is commendable that the Agencies apparently seek to resolve some of the confusion over the jurisdictional reach of the CWA in the Proposed Regulation, our view is that only Congress can fix this problem. The Proposed Regulation would resolve the vast majority of jurisdictional disputes by applying categorical rules, which will result in expansive assertions of jurisdiction. But *Rapanos* makes clear that categorical assertions of jurisdiction must be rejected. It is simply beyond the authority of the Agencies to expand CWA jurisdiction through the rulemaking process in a manner that conflicts with the jurisdictional tests set forth in *Rapanos* and her progeny.

The Agencies Cannot Use the Rulemaking Process to Reach Beyond the CWA's Constitutional Limits

The Agencies are not writing on a blank-slate here. The Supreme Court has made clear that there are constitutional limits on the jurisdictional reach of the CWA. The Agencies have been

repudiated for overreaching in the past, and will be again if the Proposed Regulation is understood as reaching beyond the constitutional limitations recognized in *Rapanos*.

While there are still grounds for disputing how far CWA jurisdiction reaches on a case-by-case basis, *Rapanos* set the outer-limits. And the Agencies cannot exceed those limits any more than Congress could. Accordingly, the only question is whether the Proposed Regulation goes beyond what *Rapanos* would allow. For the reasons set forth below, we maintain the Proposed Regulation is inconsistent with *Rapanos* and should therefore be amended or abandoned entirely.

CWA Jurisdiction Under Rapanos

The CWA prohibits the discharge of pollutants into "navigable waters" and defines those waters as the "waters of the United States." But, the Supreme Court has repeatedly rebuffed overly expansive interpretations of "waters of the United States." Most recently in *Rapanos*, the Supreme Court made clear that jurisdictional wetlands must have some connection or nexus to "traditional navigable waters."

Unfortunately, the Court offered two distinct tests for determining whether there is a sufficient connection or nexus to satisfy the constitutional requirement that CWA regulation bear some connection to interstate commerce. Under the plurality's test, CWA jurisdiction may only be established where there is a continuous surface connection from traditional navigable waters, such that it is difficult to determine where the water body ends and the wetland begins. *Rapanos*, 547 U.S. at 742. By contrast, Justice Kennedy's test would instead extend CWA jurisdiction to any wetland with a significant nexus to navigable waters. According to Justice Kennedy:

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"

Id. at 780.

To date the federal appellate courts are split as to which test is controlling. The Seventh, Ninth and Eleventh Circuits hold that Justice Kennedy's "significant nexus" test controls. *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robinson*, 521 F.3d 1319 (11th Cir. 2008). Whereas the First and Eighth Circuits hold that jurisdiction may be established under either test. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *United States v. Baily*, 571 F.3d 791 (8th Cir. 2009). And at least one district court has held that the plurality's "continuous surface connection" test is controlling. *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006).

The Federal Response to Rapanos

In the wake of *Rapanos* the regulated community, and regulators alike, struggled to make sense of the fact intensive "essential nexus" and "continuous surface connection" tests. To assist

regulators in making jurisdictional assessments, the Agencies released a guidance document in December, 2008. Thereafter, the Agencies proposed a new guidance document in 2012.

As we noted in a November 16, 2012 letter to the Office of Information and Regulatory Affairs, "the 2008 guidance was much more conservative than the newly proposed 2012 guidance." We explained that the 2008 guidance was mostly faithful in defining the contours of CWA jurisdiction in accordance with the *Rapanos* tests, whereas the 2012 guidance liberally mischaracterized the *Rapanos* tests in order to justify more expansive jurisdictional assertions. Ultimately the Agencies abandoned the proposed 2012 guidance, choosing instead to pursue this rulemaking; however, the Proposed Regulation defines CWA jurisdiction consistent with the expansive 2012 guidance. Accordingly, NFIB opposes the Proposed Regulation for the same reasons it opposed the 2012 guidance.

The Proposed Regulation Would Expand CWA Jurisdiction in Contravention of Rapanos

For the foregoing reasons NFIB contends that the Proposed Regulation exceeds federal authority by expansively asserting CWA jurisdiction. The following is a non-exhaustive list of our legal objections to the proposed guidance:

(1) The Proposed Regulation misrepresents the standard for 'traditional navigable waters'

The Proposed Regulation defines "traditional navigable waters" as any waters that are used for commerce or that could be used for commerce in the future. But the Proposed Regulation would effectively expand CWA jurisdiction by lowering the threshold for demonstrating the potential for navigable use in commerce. Specifically, the Proposed Regulation provides that the potential for commercial navigation "can be demonstrated by current boating or canoe trips for recreation or other purposes."

The courts have made clear that the test for "traditional navigable waters" must consider *both* the "physical characteristics" of the water body and "experimentation" with watercraft or other demonstrated "uses to which the [waters] have been put." *FLP Energy Marine Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (citing *United States v. Utah*, 283 U.S. 64, 83 (1931)). While the Proposed Regulation suggests that the Agencies' assessment must take into account physical characteristics of the waterway, it ultimately provides that the water will be viewed as "traditional navigable waters" if there is any evidence that a watercraft can navigate the waterway. This would seemingly justify the Agencies treating any waterway as "traditional navigable water" if any party can succeed in a single downstream trip—an approach that we think far too attenuated to satisfy the standard recognized in *FLP Energy Marine Hydro LLC*.

Most fundamentally, the Proposed Rule fails to make clear that "traditional navigable waters" must be conducive to interstate or foreign commerce. This omission—in conjunction with the Proposed Regulation's liberal suggestion that navigability may be established without regard to the physical characteristics of the water body—suggests that the Proposed Regulation will lead to expansive jurisdictional assessments, without regard to the question of whether in fact the water body is susceptible to interstate or foreign commerce.

(2) The Proposed Regulation inappropriately treats all interstate waters as 'traditional navigable waters'

The Proposed Regulation inappropriately treats all interstate waters as "waters of the United States," regardless of whether they are in fact navigable, or even "connect[ed] to such waters." But, the Supreme Court has made clear that jurisdiction may not be assumed in this manner. To assert jurisdiction, an agency must demonstrate that there is a connection to traditional interstate navigable waters. And the potential for commercial navigation must be proven in fact. *Rapanos*, 547 U.S. at 739.

(3) The Proposed Regulation misstates, misconstrues and changes the 'significant nexus test'

As stated by Justice Kennedy in *Rapanos*, waters have the "requisite significant nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical **and** biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (emphasis added). But the Proposed Regulation expands CWA jurisdiction by distorting Justice Kennedy's "significant nexus test," such that it will liberally justify jurisdictional assertions beyond what the test would allow for if properly applied. The result is an expansion of CWA jurisdiction.

First, the Proposed Regulation misstates the significant nexus test by replacing the conjunctive word "and" with the disjunctive word "or," when listing the different factors to be considered in determining whether the subject wetland has a sufficient nexus to traditional navigable waters. *See* Proposed Regulation, P-99 ("Justice Kennedy was clear that waters with a significant nexus must significantly affect the chemical, physical, *or* biological integrity of a downstream navigable water....") (emphasis added). This misstatement is significant because it effectively lowers the standard for establishing jurisdiction. Under the Proposed Regulation, Agencies will assert jurisdiction if they can demonstrate *either* that the subject wetland—and similarly situated lands in the region—significantly affect the chemical and physical integrity of other jurisdictional waters *or* that they affect the biological integrity of those waters. But, Justice Kennedy's jurisdictional test was not an either or proposition. To satisfy the 'significant nexus test,' one must demonstrate all three factors: The subject wetland, and similarly situated lands, must have a significant effect on the (1) chemical, (2) physical and (3) biological integrity of other jurisdictional waters.

Second, the Proposed Regulation misconstrues the significant nexus test by stating that the test will be satisfied if it can be demonstrated that the chemical, physical or biological effect on jurisdictional waters is more than "speculative or insubstantial." This enables the Agencies to assert CWA jurisdiction without proving that the subject wetlands are in fact having a *significant impact* on other jurisdictional waters. This incorrectly shifts the burden of proof from the agency asserting jurisdiction to the property owner.[1] Under the Proposed Regulation, the Agencies will now presume jurisdiction unless proven otherwise. But Justice Kennedy made clear that the

[1] In attempting to shift the burden from the agency asserting jurisdiction to the landowner contesting jurisdiction, the Proposed Regulation will place further economic strain on landowners who seek to defend their property rights.

agency must bear the burden of demonstrating substantial effects on other jurisdictional waters. *Rapanos*, 547 U.S. at 784 (Kennedy, J. concurring).

Third, the Proposed Regulation changes the significant nexus test by expanding the definition of "region." This is significant because Justice Kennedy provided that the test should consider the affect that the wetland—"either alone or in combination with similarly situated lands in the **region**"—has on other jurisdictional waters. *Id.* at 780 (emphasis added). Logically, a narrow understanding of the term "region" will cabin relevant considerations, whereas a broad understanding will allow the Agencies to more readily assert jurisdiction. And the Proposed Regulation stretches the term far beyond the localized concerns that Justice Kennedy had in mind and far beyond the definition provided in the 2008 Guidance document. In fact, this is probably the most radical aspect of the Proposed Regulation because it defines the relevant region as the entire "watershed," which would entail more than a million square miles—or 41% of the lower 48 states—in the Mississippi watershed alone.[2] *See* Proposed Regulation, P-95 ("The agencies propose to interpret the phrase 'in the region' to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry.").

(4) The Proposed Regulation inappropriately asserts jurisdiction over almost any ditch

The Proposed Regulation provides that any "natural, man-altered, or man-made water body" with an ordinary high water mark will be considered a tributary, and therein requires the Agencies to assert jurisdiction over practically any land over which water occasionally flows by applying either the 'continuous surface connection" or "nexus" tests. But, both *Rapanos* tests reject such an expansive interpretation of CWA jurisdiction. *Rapanos*, 547 U.S. at 731-32. Justice Kennedy's "significant nexus test" was not intended to apply beyond wetlands to tributaries. And the plurality's "continuous surface connection" test was intended to strictly limit CWA jurisdiction over tributaries, and would not justify assertions of jurisdiction over "ditches, channels and conduits." *Id.* at 737-39.

(5) The Proposed Regulation erroneously bootstraps the CWA's regulatory reach over adjacent wetlands

Under the *Rapanos* plurality opinion, the Agencies may be able to assert jurisdiction over wetlands that are adjacent to traditional navigable waters.[3] But in order to do so they must demonstrate that there is a continuous surface connection between such "traditional navigable waters" and the wetland, such that it is difficult to discern where the water ends and the wetland begins. *Rapanos*, 547 U.S. at 742. Yet the Proposed Regulation asserts jurisdiction over wetlands without regard to whether there is a continuous surface connection.

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[2] *See* Army Corps of Engineers, The Mississippi Drainage Basin, http://www.mvn.usace.army.mil/Missions/MississippiRiverFloodControl/MississippiRiverTributaries/MississippiDrainageBasin.aspx (last viewed 10/02/14).

[3] The Rapanos plurality defined a "traditional navigable water" as a "relatively permanent, standing or continuously flowing bod[y] of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes." *Rapanos*, 547 U.S. 739.

The Proposed Regulation invokes Justice Kennedy's significant nexus test in justifying an assertion of jurisdiction over waters adjacent to relatively permanent, non-navigable tributaries that are connected downstream to "traditional navigable water." The Agencies therein operate on the assumption that adjacent waters are always sufficiently integrated with the ecological system of the entire watershed. This much is true in so far as the Proposed Rule defines "adjacent waters" as having a significant nexus to traditional navigable waters. But that circular definition tells us nothing as to when adjacent waters will in actuality be jurisdictional.

The fundamental problem is that the Proposed Regulation operates so as to create a presumption of jurisdiction—a presumption that may not bear out in practice. This is highly problematic because the burden should not be on the landowner to disprove CWA jurisdiction. The burden should rest on the Agencies to prove the existence of a "significant nexus" in any given case.

The Proposed Regulation Will Impose Heavy Economic Costs on Development for Newly Regulated Properties All Across the Country

As explained more fully in the previous section, the Proposed Regulation should be rejected because it improperly requires assertions of jurisdiction in contravention of Supreme Court precedent. But, our concern is over the real-world impacts that the Proposed Regulation will have on countless landowners across the country. Because the Proposed Regulation so greatly expands CWA jurisdiction, it will have severe practical and financial implications for many affected landowners.

If a portion of a property is deemed jurisdictional wetland, the owner cannot make use of that segment of his or her property. Indeed, the owner will face devastating fines of up to $37,500 per day if he or she begins to develop. *See Sackett v. EPA*, 132 S.Ct. 1367, 1370 (2012). As a result, most landowners—especially individuals of modest means and average small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional wetland covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property.

In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. As of 2002, the average CWA permit cost over $270,000. *See Rapanos*, 547 U.S. at 720 (plurality opinion) (citing Sunding & Zilberman, The Economics of Environmental Regulation and licensing: An Assessment of Recent Changes to Wetland Permitting Process, 42 Nat. Res. J. 59, 74-76 (2002)).

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses and individuals of modest means are without recourse. Usually their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses and individuals suffer greatly because they have usually tied up much of their assets into their real estate investments and they can neither afford necessary permits or legal representation to challenge improper jurisdictional assertions.

The Proposed Regulation Will Chill Development and Devalue Countless Other Properties

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the Proposed Regulation is finalized. Landowners are already aware that the Agencies have taken an aggressive posture in making jurisdictional assertions in recent years; however, the regulated community is greatly concerned that the Proposed Regulation—if approved—signals a dramatic shift toward an even more aggressive jurisdictional reach. As a result, landowners are understandably concerned about the potential for the Agencies to use the Proposed Regulation to justify jurisdictional assertions.

The NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from many more concerned individuals if the Proposed Regulation is finalized in its current form. Indeed, if any amount of water rests or flows over a property—at any point during the year—the owner may have cause for concern that the Agencies might assert CWA jurisdiction.

Unfortunately the Proposed Regulations will do little to make CWA jurisdiction clearer for these property owners. It is true that the Proposed Regulation offers a veneer of simplicity in asserting categorical jurisdiction over many waters. But many landowners will question whether the agency is overreaching in applying these *per se* rules. And of course, the Proposed Regulation does nothing to clear up confusion with regard to "other waters," which will still be assessed on a case-by-case basis. Further, the Proposed Regulation is still extremely complicated—so much so that landowners will still have to retain experts in many cases in order to determine whether a property may be developed.

Importantly, properties swept into the CWA's jurisdictional net will depreciate greatly in value under the Proposed Regulation. Even in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might potentially be viewed as jurisdictional. And that is a risk that most reasonable individuals would be unwilling to take. Indeed, they face fines of up to $37,500 per day if they are mistaken. And for this reason any property that might be viewed as containing a jurisdictional wetland is greatly devalued.

Implementation of the Proposed Regulation Will Result in New Federal Liabilities

Finally, we must stress the importance of avoiding unnecessary liabilities. The federal government cannot afford to exacerbate is budgetary problems by adopting the Proposed Regulation because it will result in incalculable litigation costs and inverse condemnation liabilities. Not only will the Proposed Regulation result in lost economic opportunities—for reasons explained in the previous section—but it will result in a tremendous amount of litigation.

Since the Proposed Regulation requires the Agencies to make expansive assertions of jurisdiction, litigants will predictably challenge their jurisdictional assessments. Moreover, these expansive jurisdictional assessments will take away the right of many landowners to make any

beneficial use of their properties. And the federal government will therein incur takings liability under the Fifth Amendment for these properties.

Conclusion

We maintain that the Agencies' Proposed Regulation represents bad public policy because it increases regulatory burdens on small business landowners by expanding the jurisdictional reach of the Clean Water Act. This is especially inappropriate given the Supreme Court's repeated admonition against overly expansive jurisdictional assertions. And because we submit that the Proposed Regulation will expand the Agencies' jurisdictional reach beyond what Supreme Court precedent allows, NFIB urges the Agencies to withdraw the Proposed Regulation at this time.

We appreciate the opportunity to comment on the proposed rule. Should the Agencies require additional information, please contact the NFIB's Small Business Legal Center's senior staff attorney, Luke Wake, at 916-448-9904.

Sincerely,

Amanda Austin
Vice President, Public Policy
NFIB

NFIB
The Voice of Small Business.

October 15, 2014

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA–HQ–OW–2011–0880 – Definition of "Waters of the United States" Under the Clean Water Act

These comments are submitted for the record to the U.S. Army Corps of Engineers and the Environmental Protection Agency (the Agencies) on behalf of the National Federation of Independent Business (NFIB) and the NFIB Small Business Legal Center in response to the notice of proposed rulemaking regarding Definition of "Waters of the United States" Under the Clean Water Act (proposed rule) published in the April 21, 2014 edition of the *Federal Register*.

NFIB is the nation's leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States, in varying industries that cover virtually all of the small businesses potentially affected by this proposed rule.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The proposed rule will expand federal jurisdiction under the CWA. This expanded jurisdiction will lead to an increased need for small businesses to apply for permits. Consequently, small businesses will feel a direct economic impact. NFIB believes EPA has incorrectly certified the proposed rule as having no significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (RFA) and its amending laws.

These comments explicitly address the Agencies' RFA certification. NFIB has concurrently filed separate comments outlining our objections to the Agencies' decision to interpret the CWA's jurisdictional provisions broadly, beyond those limits established by Congress and recognized by the U.S. Supreme Court.

An Overview of the Regulatory Flexibility Act

The RFA was passed by Congress and signed into law in 1980 as an acknowledgement that "uniform Federal regulatory and reporting requirements have in numerous instances imposed

unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources."[1]

The law required that all agencies, when issuing proposed and final rules subject to the Administrative Procedure Act, consider the economic impact of their rules on small entities. In addition, agencies must consider alternative regulatory approaches that minimize burden and make their analyses available for public comment.

Under the RFA, agencies are required to perform a screening analysis to determine if there is likely to be a significant economic impact on a substantial number of small entities. If an agency finds that there will not be, then it certifies the rule as having no impact and must explain why. If a proposed rule will have an impact, then the agency must conduct an Initial Regulatory Flexibility Analysis (IRFA). An IRFA consists of six components, per the U.S. Small Business Administration's Office of Advocacy[2]:

1. A description of the reasons why the action by the agency is being considered.
2. A succinct statement of the objectives of, and legal basis for, the proposed rule.
3. A description – and, where feasible, an estimate of the number – of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.
5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statues and which minimize any significant economic impact of the proposed rule on small entities.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) was passed by Congress in 1996 to give the RFA more effect. Most importantly for the present case, the EPA is required to convene Small Business Advocacy Review (SBAR) panels of small entity representatives when an IRFA is necessary.

Unfortunately, the Agencies have certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. This decision prevented the Agencies from getting quality input on the proposed rule from small businesses before it was published. Given the controversial nature of the rule, NFIB believes the Agencies would have benefitted from the IRFA and SBAR process.

The agencies did a minimal amount of outreach to small businesses before publishing the proposed rule, but this outreach in no way meets the requirements of the RFA. Further, the Agencies' dismissive response to small business concerns is troubling. If anything, the Agencies should have taken small business concerns more seriously after noting that: "[t]he national industry associations in attendance feel strongly that the EPA should complete a regulatory

flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel..."[3] But instead the Agencies swept those concerns aside and concluded that the proposed rule will not impose substantial adverse economic impacts.

NFIB believes that this certification is improper. The following section will examine the Agencies' reasons for the certification and will demonstrate that they lack a factual basis. Accordingly, NFIB believes the Agencies should (1) acknowledge that the proposed rule will have a significant adverse impact on a substantial number of small businesses; (2) withdraw the proposed rule; and (3) wait to propose a new rule until the Agencies have considered less burdensome alternative interpretations of the pertinent CWA jurisdictional provisions.

The Agencies' Certification Lacks a Factual Basis

NFIB believes that the Agencies' certification lacks a factual basis as required by the RFA. The Agencies have pinned their justification for the certification on three arguments: (1) the proposed rule is merely a definitional change having no direct impact on any entity; (2) the proposed rule adds clarity for small businesses and other entities that will make determinations easier—therein reducing burdens on the regulated community; and (3) the proposed rule narrows CWA jurisdiction—therein reducing burdens on small entities.

However, these cited justifications are plainly strained efforts to avoid a full RFA analysis; they represent either a poorly conceived effort to contort reality or a severe disconnection with the real world implications of the propose rule. The proposed rule will dramatically expand CWA jurisdiction beyond the limits recognized in *Rapanos v. United States* and this will necessarily have a significant adverse economic impact on a substantial number of small entities.

(1) A Definitional Change Can Have Severe Adverse Impacts on Small Businesses

The Agencies' first argument is that the proposed rule only changes the definition of "waters of the United States" and therefore has no direct impact. However, this argument ignores the clearly foreseeable direct impacts of the change. The definitional change has serious real world implications for landowners—including many small businesses and other small entities—owning properties that may now be considered jurisdictional wetlands under the CWA.

As an example, a small business may not currently need a section 404 dredge or fill permit to begin construction on a portion its property, or to make other uses of its land. But, with the new rule interpreting "waters of the United States" more broadly, the Agencies may very well assert jurisdiction over this property *for the first time*. As such, the business would therein be immediately subject to CWA's burdensome permitting process if it should wish to make economically beneficial use of this portion of land. As discussed in more detail below, this immediately devalues the affected property and stands to impose major costs on owners seeking to make use of the affected portions of their property.

(2) The Agencies are Imposing Significant Adverse Economic Impacts on Small Business by Clarifying that they are Interpreting the CWA's Jurisdictional Provisions Broadly

The Agencies' second argument is that the proposed rule would bring clarity to jurisdictional questions. It may well be that the new rule brings some degree of clarity *to the Agencies*, but the Agencies cannot assert that it is giving a benefit to the regulated community by resolving a murky question of statutory construction *categorically against private property owners*. Moreover, the proposed rule is still terribly complicated—meaning that ordinary landowners, including small business landowners, will have to hire costly environmental experts, or legal counsel to determine if it is safe to use questionable portions of their property.

Indeed, several small business owners, with whom we have talked, have indicated they have no idea how the proposed rule would impact them. They have expressed concerns that it vaguely worded and difficult to understand. To be sure, the 88-page proposed rule fails to offer much clarity to ordinary landowners struggling to figure out whether they have been swept-up in the new CWA regime.

Of course, given the severe financial penalties that apply when a landowner makes a mistake, many will still feel compelled to seek formal jurisdictional assessments from the Agencies before making constructive uses of their lands. As a practical matter, the proposed rule still requires a case-by-case determination that can only be done by the Agencies in many cases. As such, NFIB submits that the proposed rule does little to bring clarity here; if anything it gives small business new reasons to question whether their properties may be swept into the CWA jurisdictional regime for the first time. And to the extent the newly proposed rule "clarifies" that a property is jurisdictional, the rule necessarily *burdens* the landowner.

(3) The Proposed Rule Expands Jurisdiction—It Does Not Narrow Anything

The Agencies argue that, compared to the 1986 rule, the proposed rule actually decreases the Agencies' jurisdiction. But it is simply inappropriate to rely on the 1986 rule as a baseline because the U.S. Supreme Court has twice held that the 1986 rule interpreted waters of the United States more broadly than Congress could have intended, or than the Constitution would allow. In the most recent case, *Rapanos v. United States*, the Supreme Court set forth two tests for determining whether a property contains jurisdictional wetlands. In doing so, the Supreme Court set the law on how "waters of the United States" should be defined in 2006. Thus the *Rapanos* tests represent the baseline against which the Agencies must judge the effect of the newly proposed rule.

Rapanos set the outer-limits of what the Agencies can reach under the CWA's jurisdictional provisions. Accordingly, the Agencies can only seriously maintain that the newly proposed rule "narrows jurisdiction" if it may be said that the Agencies are actually disavowing jurisdictional assertions from those outer-limits. But the Agencies have insisted that the new rule is consistent with the *Rapanos* tests. Of course, NFIB disagrees emphatically.

In any event, it is inappropriate for the Agencies to certify that the proposed rule narrows CWA jurisdiction by reference to the 1986 rule because that rule was rendered invalid in the *Rapanos* decision. Thus the ultimate question is whether the newly proposed rule is consistent with or inconsistent with the *Rapanos* tests. NFIB maintains that the new rule extends the CWA's

jurisdictional reach beyond what the *Rapanos* tests allows. If that's the case then the Agencies are expanding—not narrowing—CWA jurisdiction.

In light of the Agencies' erroneous certification, the EPA and Army Corps should withdraw the proposed rule, perform an IRFA and convene an SBAR panel before publishing a new proposed rule.

The Proposed Rule Will Have Direct Adverse Impacts on Many Small Businesses

The Agencies are pursuing a significant expansion of federal CWA jurisdiction, which will necessarily exert more government control over private properties—including many owned by small businesses. As a result, the proposed rule will have severe practical and financial implications for many. This is because a business owner cannot make economically beneficial uses of his or her land once it is considered jurisdictional. And if an owner proceeds with a project on a portion of land that might be considered a water of the U.S., the owner faces the prospect of devastating fines—up to $37,500 per day.

Consequently, most landowners—especially small businesses—will be forced into keeping their properties undeveloped. If the purported jurisdictional water covers the entire property, the owner may well be denied the opportunity to make any productive or economically beneficial use of the property. In some cases, it may be possible for the owner to obtain a permit to allow for development; however, there is no guarantee a permit will be issued. Moreover, for small business owners and individuals of modest means, such a permit is usually cost prohibitive. Indeed, the Supreme Court noted in *Rapanos* that the average CWA permit costs more than $270,000.

While multinational corporations with tremendous capital resources might be able to afford such costs, most small businesses are without recourse. Usually, their only option is to swallow their losses and forgo any development plans. Unfortunately, these small businesses suffer greatly because they have usually tied up much of their assets into their real estate investments and can neither afford necessary permits, nor legal representation to challenge improper jurisdictional assertions. And lawsuits challenging these assertions are fact intensive and extremely costly to litigate.

The Proposed Rule Will Also Have Indirect Adverse Impacts on Many Small Businesses

Even in the absence of an affirmative assertion of CWA jurisdiction, landowners will be more hesitant to engage in development projects or to make other economically beneficial uses of their properties if the proposed rule is approved. Landowners are already aware that federal agencies have taken an aggressive posture in making jurisdictional assertions in recent years. And now that the Agencies have proposed this rule, it is apparent that they are taking an even more aggressive approach to jurisdictional issues—a signal that landowners can expect greater enforcement actions in the future.

NFIB already receives questions and concerns from small business owners who are worried about whether the Agencies have jurisdiction over their properties. And we expect to hear from

many more concerned individuals if the proposed rule is finalized. Indeed, under the proposed rule a landowner may have legitimate cause for concern if—at any point during the year—any amount of water rests or flows over a property.

And contrary to the Agencies' assertions, the proposed rule will do little or nothing to make CWA jurisdiction clearer for most properties. The reality is that landowners will have to seek out experts and legal counsel—which gets costly quickly—before developing on any segment of land that occasionally has water overflow. And, the only way to have definitive clarity is to seek a formal jurisdictional determination from the Agencies, which costs more money and further delays development plans.

Of course, in the absence of a formal jurisdictional assessment, property owners proceed at their own risk if they wish to use portions of their property that might be viewed as jurisdictional. Indeed, they face ruinous fines of up to $37,500 per day if they errantly begin filling in—or dredging—land that the Agencies believe is a jurisdictional water. And for this reason any property that might be viewed as containing a jurisdictional water will be greatly devalued. In addition, even if the property owner is found to be in the right, he or she may use all their assets fighting to prove that their land is not jurisdictional.

Conclusion

NFIB believes that the Agencies have clearly failed to comply with the requirements of the RFA. The Agencies have incorrectly certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. As such, the Agencies should withdraw the proposed rule, perform an IRFA and convene and SBAR panel before considering issuing a new proposal.

We appreciate the opportunity to comment on the proposed rule. Should the Agencies require additional information, please contact the NFIB's manager of regulatory policy, Dan Bosch, at 202-314-2052.

Sincerely,

Amanda Austin
Vice President, Public Policy
NFIB

[1] Regulatory Flexibility Act, Pub. L. No. 96-354

[2] The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act. 2010. http://www.sba.gov/sites/default/files/advocacy/RFA_in_a_Nutshell2010.pdf

[3] EPA Summary of the Discretionary Small Entity Outreach for Planned Proposed Revised Definition of "Waters of the United States". pp. 10. Docket ID: EPA-HQ-OW-2011-0880-1927.

AMERICAN
SUSTAINABLE
BUSINESS
COUNCIL

Statement

"An Examination of Proposed Environmental Regulation's Impact on America's Small Businesses."

Committee on Small Business and Entrepreneurship

United States Senate

On behalf of the 200,000 businesses we represent, the American Sustainable Business Council (ASBC) respectfully submits this testimony on the economic benefits to sound, scientifically based regulations like the Clean Water Rule.

The business community needs clean water to be successful. It goes into our products, it helps keep our employees and consumers healthy, and not having it can literally kill American businesses. The Environmental Protection Agency (EPA) issued its final rule – the Clean Water Rule - to clarify its jurisdiction under the Clean Water Act. As a business leaders, we urge you not to take any action that will undermine this new rule.

Companies engaged in manufacturing, food production, tourism, and many other sectors rely on clean water for use in their products and processes. Thanks to ever increasing consumer demand, clean water is becoming even more crucial for American businesses. Protecting it isn't a burden on businesses - it's essential for the survival.

The EPA's rule will give the business community more confidence that streams and rivers will be protected and provide a consistent regulatory system based on sound science, while ensuring that no extra authority goes to the agency and exemptions for sectors like agriculture remain in place.

TEL: 202.595.9302
1401 NEW YORK AVE. NW
SUITE 1225
WASHINGTON DC 20005

ASBCOUNCIL.ORG

National, scientific polling[i] of independent small businesses commissioned by ASBC last year demonstrates how important clean water is to business owners. Eighty percent of small business owners, including 78% of Republicans and 73% of independents, favor federal rules like those proposed by the EPA to protect upstream headwaters. The polling also found:

- 71% of small business owners agree that clean water is necessary for jobs and the economy.
- 67% are concerned that water pollution could hurt their business in the future.
- 62% agree that government regulation is needed to prevent water pollution.
- 61% believe that government safeguards for water are good for businesses.
- 60% believe that complying with clean water regulations is more economical than risking harm from neglecting safety practices.

During 2014, EPA accepted comments on the proposed rule for many months, twice extending the comment period to accommodate higher interest from business environmental and agricultural groups. EPA should be given the opportunity to incorporate the public's views, and finalize the rule in a way that clarifies what needs to be.

For this reason, we questioned the merits of the Small Business Administration Office of Advocacy's comments to EPA were misguided and contrary to what the scientific national polling found.[ii]

ASBC greatly appreciates the opportunity to provide comments to the hearing record.

Sincerely,

Richard Eidlin
Vice President of Policy and Campaigns
American Sustainable Business Council

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[i] Small Business Owners Favor Regulations to Protect Clean Water, results from a scientific national phone poll of small business owners July 2014
http://asbcouncil.org/sites/default/files/asbc_clean_water_poll_report_july2014_sv_final_140721v2sm.pdf

[ii] ASBC Statement, Oct 2, 2014 http://asbcouncil.org/news/press-release/business-leaders-question-sba-advocacys-comments-epas-water-rule

CITY OF BALTIMORE
COUNCIL BILL 14-0185R
(Resolution)

Introduced by: Councilmembers Kraft, Scott, Henry, Middleton, Mosby, Holton, Welch, Reisinger, Stokes, Branch, Clarke, Curran, President Young
Introduced and adopted: September 8, 2014

A COUNCIL RESOLUTION CONCERNING

In Support of the Definition of "Waters of the United States" Under the Clean Water Act Proposed by the Environmental Protection Agency and the Army Corps of Engineers.

FOR the purpose of supporting the Environmental Protection Agency's ("EPA") and the Army Corps of Engineers' (the "Corps") proposed definition of "Waters of the United States" under the Clean Water Act; helping to enhance the protection of our nation's public health and aquatic resources, and increasing the Clean Water Act's program predictability and consistency by clarifying the scope of the "Waters of the United States" protected under the Act.

Recitals

The waters of the United States are a treasured resource. In Maryland, the clean water that they provide protects public health, recreational resources, and economic livelihood.

The Clean Water Act is the fundamental federal law protecting the waters of the United States from pollution, degradation, and destruction. Strong federal standards are needed to provide these protections because water does not respect political boundaries. More than one thousand peer-reviewed, scientific studies have confirmed that headwater intermittent and ephemeral streams and wetlands affect the quantity and quality of water in larger bodies of water downstream.

Critical streams and wetlands which supply drinking water, protect against floods, and filter pollutants were once protected under the Clean Water Act. Federal policy changes over the last decade, however, have left these streams and wetlands vulnerable to degradation and destruction. These vulnerable waters of the United States, now unprotected and vulnerable, directly impact sources of drinking water for over 117 million Americans, including 3,990,016 residents here in Maryland.

Both the EPA and the Corps have proposed a clarification of the definition so that there is no misunderstanding all tributary streams, regardless of size or frequency of flow are covered under the Clean Water Act. Of particular importance is the fact that an additional proposal not only leaves in place all of the existing agricultural exemptions but also creates new exemptions for agricultural practices related to conservation.

According to Clean Water Action, this will restore protections to 2,210 miles of streams in Maryland that 77% of its residents depend upon for drinking water. In the greater Baltimore area that constitutes roughly 1.6 million people, including every one of our City residents.

EXPLANATION: Underlining indicates matter added by amendment.
~~Strike-out~~ indicates matter deleted by amendment.

dlr14-0975(4)-1st/09Sep14
ccres/cb14-0185R-1st/sg:nbr

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF BALTIMORE, that the Council supports the proposed definition of "*Waters of the United States*" under the Clean Water Act and urges the Environmental Protection Agency and the Army Corps of Engineers to take whatever actions deemed necessary to finalize these important protections for our nation's resources.

AND BE IT FURTHER RESOLVED, That a copy of this Resolution be sent to the Mayor; the Administrator of the U.S. Environmental Protection Agency; the Assistant Secretary of the Army, Department of the Army, Civil Works; The Maryland House and Senate Delegations to the 113th Congress; and the Mayor's Legislative Liaison to the City Council.

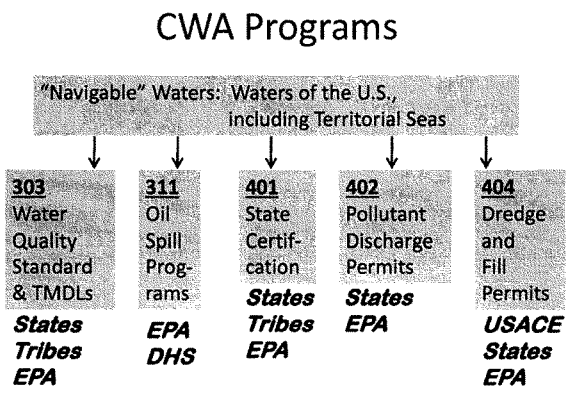
EPA Summary
of the
Discretionary Small Entity Outreach
for
Planned Proposed
Revised Definition of
"Waters of the United States"

INTRODUCTION

The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are currently developing a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme court cases, particularly decisions in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers* (*SWANCC*); and *Rapanos v. United States and Carabell v. United States (Rapanos)*. The agencies are undertaking this rulemaking with the goals of increasing CWA program predictability, timeliness, and consistency by increasing clarity regarding the scope of "waters of the United States" covered under the Act, and would enhance protection for the nation's aquatic resources consistent with science and the law.

Waters, including wetlands, found to be "waters of the U.S." under the Act and relevant case law are subject to CWA requirements. Waters that do not meet this definition are not subject to CWA provisions. Exhibit 1 identifies the CWA programs that rely on the definition of "waters of the U.S.", along with the government entities that are responsible for administering the programs. The CWA establishes oil spill prevention programs (Section 311); requires permits for pollutant discharges (Section 402); requires permits for the placement of dredged or fill material in waters of the United States (Section 404); calls for states to set standards for meeting water quality goals and develop plans to restore polluted waters (Section 303); establishes state roles in certifying that federal permits will not violate state water quality standards (Section 401); and provide tools for the federal government, states, and communities to enforce the law.

Exhibit 1. Clean Water Act Programs That Rely on the Definition of "Waters of the United States."



3

Recent court rulings and interpretations of water laws have sparked confusion and increased uncertainty regarding which waters are protected under the Clean Water Act, especially for headwater streams and wetlands.

As requested by a diverse group of stakeholders including the agriculture community, environmental and conservation groups, and state and local governments, the EPA and the Corps are seeking to provide clarification via notice and comment rulemaking as to what waters are and are not jurisdictional and thus under the purview of the CWA. The agencies understand that case-specific decisions concerning whether or not a waterbody is subject to the CWA may affect small entities who may, as a result, need to determine whether or not authorization is necessary to discharge pollutants into waterways. The lack of clarity and case-by-case determinations made necessary by *SWANCC* and *Rapanos* have resulted in delays and confusion which the agencies are eager to address in their rulemaking to reduce impacts on the public, including small entities. Small entities also benefit from the functions provided by intermittent, ephemeral and headwater streams and wetlands, such as purifying water and reducing potential treatment costs, reducing flood flows, and assuring reliable and constant supplies of water.

The overall geographic scope of the proposed regulation is narrower than it was before *SWANCC* and *Rapanos*, when the current rule was written. The agencies recognize and agree that the effect of the Supreme Court decisions was to narrow the geographic reach of the Act and the proposed rule reflects that. The scope of the regulations as proposed is narrower than the scope of the existing regulations. The agencies expect, however, that in clarifying the reach of waters under the Act, the proposed rule is likely to result in a slight increase in waters found jurisdictional compared to current practice under the 2008 guidance. The agencies expect the increase to be small, if at all, and occur in the context of improving the process of making jurisdictional determinations more quickly, more predictably, and with greater national consistency. Overall, small entities (and other regulated groups) have emphasized to EPA the importance of clarity, predictability, and consistency for their businesses and for the American taxpayer. In addition, the proposed rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. § 1362(7)), consistent with Supreme Court precedent.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. After considering the economic impacts of this proposed rule on small entities, the agencies have certified that this proposed rule will not have a significant impact on a substantial number of small entities.

In 2011, the EPA and the Corps of Engineers conducted an outreach meeting designed to exchange information with small entities that may be interested in this action. The outreach effort was led by representatives from EPA's Office of Wetlands, Oceans, and Watersheds within EPA's Office of Water; the Army Corps of Engineers Regulatory Program; the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Office of Advocacy of the Small Business Administration (SBA).

This summary includes the following:

- Background information on CWA jurisdiction and relevant case law;
- A summary of the outreach meeting;
- The written comments of the small entity participants; and
- A discussion of the comments.

Once completed, the final summary for this outreach meeting will be included in the rulemaking record. The agencies have developed the proposed rule in consideration of input received as a result of the small entity meeting. We are prepared to make additional changes in response to public comments on the proposed rule, including any comments from small entities.

It is important to note that the findings and discussion in this summary are based on the information available at the time this summary was drafted. The EPA and the Corps are continuing to

conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rule development process and from public comments on the proposed rule.

BACKGROUND

Clean Water Act programs are applicable to all "navigable waters" which are defined in the statute as the "waters of the United States, including the territorial seas." The definition of "waters of the United States" is used in the implementation of all CWA programs including Sections 303, 311, 401, 402, and 404. The EPA is charged with overseeing implementation of all Clean Water Act programs, including Section 404. The Army Corps of Engineers administers the Section 404 program for discharges of dredged or fill material into jurisdictional waters, and makes the majority of jurisdictional determinations.[1]

After the Clean Water Act was amended in 1972, the EPA and the Corps promulgated regulatory definitions of "waters of the U.S.," and by 1979 EPA's definition looked substantially similar to what it is today. In 1982, the Corps adopted EPA's definition. The regulations define "waters of the U.S." as including waters that are:

- traditionally navigable
- interstate
- could affect interstate commerce if used, degraded, or destroyed
- territorial seas
- impoundments of jurisdictional waters
- tributaries of jurisdictional waters
- wetlands adjacent to jurisdictional waters.

The agencies' regulatory definition of "waters of the U.S." includes exclusions for waste treatment systems and prior converted cropland.

The U.S. Supreme Court addressed the scope of waters of the United States protected by the CWA in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court observed that the broad objective of the CWA to restore the integrity of the nation's waters "... incorporated a broad, systemic view of the goal of maintaining and improving water quality .... Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 133 (citing Senate Report 92-414).

The issue of CWA regulatory jurisdiction over "waters of the United States" was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159* (2001) *(SWANCC)*. In *SWANCC,* the Court (in a 5-4 opinion) held that the use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The Court noted that in the *Riverside* case it had "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States'" and that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id.* at 167, 167. *SWANCC* did not directly address other parts of the regulatory definition of "waters of the United States."

[1] States and tribes may be approved to administer the Clean Water Act Section 404 program. Michigan and New Jersey currently implement the 404 program.

Five years after *SWANCC*, the Court again addressed the CWA term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water. . ." *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *id.* The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id.* at 732 n.5.

Justice Kennedy's concurring opinion took a different approach than Justice Scalia's. Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167). He stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." *Id.* The "significant nexus" test for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands also can and should be applied to other categories of water bodies (such as tributaries to traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

In *Rapanos*, the four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the regulatory provisions defining "waters of the United States." When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices. Thus, regulatory jurisdiction under the CWA exists over a water if either the plurality's or Justice Kennedy's standard is satisfied.

The two *Rapanos* standards have been difficult to put into practice for both the regulated community who seek permits and for agency field staff. EPA and the Corps proposed draft guidance in May 2011 to provide clearer, more predictable guidelines for determining which water bodies are protected by the Act. Many comments received on the proposed guidance urged the Corps and EPA to update their regulation defining waters of the U.S. Supreme Court justices in the *Rapanos* decision similarly urged rulemaking. In September 2013, the agencies withdrew the draft guidance and submitted a rule to the Office of Management and Budget for interagency review.

OUTREACH MEETING

The EPA, in collaboration with the Corps, OMB, and SBA, conducted an outreach meeting designed to exchange information with small entities on various potential jurisdictional policies. This outreach effort targeted small businesses, small governments, and small not-for-profit organizations (collectively referred to as small entities) classified using the following definitions:

- **Small Business:** Defined under Section 3 of the Small Business Act based on a firm's category in the North American Industry Classification System (NAICS). For each industry classified in NAICS, SBA regulations specify whether an entity qualifies as "small" based on thresholds for the entity's average annual receipts or number of employees. Information about what constitutes a "small business" is available at the Small Business Administration's website: http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

- **Small Not-for-Profit Organization:** Any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

- **Small Governmental Jurisdiction:** Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.

The EPA developed an initial list of potential participants, identifying small entities to invite from small entity outreach efforts conducted for previous rulemakings and from public comments submitted to the docket for the draft jurisdictional guidance released in May 2011 (Docket EPA-HQ-OW-2011-0409). This initial draft of potential participants was shared with the Corps, the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB), and the Office of Advocacy of the Small Business Administration (SBA). At SBA's request, a few additional participants were added to the list of invitees. A complete list of those invited appears below:

Industry Representatives:

Oil and Gas:

Name and Affiliation
Sally Allen, Vice President, Administration & Governmental Affairs Gary Williams Energy Corporation
Don Johnson Calcasieu Refining Company
Walton Gresham Greshman Petroleum Company

Agriculture:

Name and Affiliation
Karen Scanlon Conservation Technology Information Center
Tom Simpson Water Stewardship, Inc.
Greg Herbruck Herbrucks Poultry Ranch
Ridley Gardner, Chairman Carlsbad Soil & Water Conservation District
Don Parrish American Farm Bureau Federation
John Thorne
Crowell & Moring LLP, representing National Agricultural Aviation Association

Construction and Development:

Name and Affiliation
Jerry Passman, Passman Homes National Association of Home Builders State Representative for LA
Trey Pebley, Vice President McAllen Construction, Inc. Associated General Contractors of America Representative
Larry Kilduff, The Kilduff Company Shopping Centers Trade Association
Ed Smariga Buckeye Development, LLC
Tom Farasy Terra Verde Associates
R.L. "Bobby" Bowling IV Tropicana Building Corporation
Dan Brodeur P.J. Keating Company
Matt Carnahan Four Corners Materials

Eric Stevenson Brox Industries
Susan Asmus, Senior Vice President National Association of Home Builders
Leah Pilconis, Senior Environmental Advisor to Association of General Contractors

Manufacturing:

Name and Affiliation
Mahta Mahdavi National Association of Manufacturers

Mining:

Name and Affiliation
Karl Meyers Mineral Energy and Technology
Adam Whitman Meridian Beartrack Company

Small Government Entities:

Municipal Separate Storm Sewer Systems or Publically Owned Treatment Works:

Name and Affiliation
Stacy Wright, Director of Environmental Health Services City of Farmers Branch, Texas
Heidi Niggemeyer California Stormwater Quality Association Monterey Regional Stormwater Program
Randy Neprash Minnesota League of Cities Stormwater Committee
Jon Klassen, President Douglas County Water Resource Authority

Transportation:

Name and Affiliation
Pete Ringen, Director and County Engineer Wahkiakum County Public Works
Mark Timmerman, Superintendent Fillmore County Roads Dept

Small NGOs:

Name and Affiliation
Suzanne Pittenger-Slear, President Environmental Concern
Jennifer McKay, Policy Specialist Tip of the Mitt Watershed Council

All invited small entity participants were provided with documents outlining the history of CWA jurisdictional policy and potential jurisdictional policies for various aquatic resources in advance of the meeting.

The meeting took place in Washington, DC, on October 12, 2011, and included representatives from the EPA, Corps, SBA, OMB, as well as the small entity participants listed below. At the meeting attendees participating in person and via conference call were briefed on the background of the rulemaking and given the opportunity to provide input on the implications of jurisdiction of various aquatic resources for the EPA to consider as the rulemaking is further developed.

The EPA invited participants to give their focused feedback on concerns that they may have regarding a potential change in jurisdiction during the meeting and also accepted written comments following the meeting. Written comments were requested by October 26, 2011, which the EPA later extended to November 17, 2011. Issues discussed during the October 12 outreach meeting and written comments are summarized below.

SMALL ENTITY PARTICIPANTS

The small entity participants that participated in this outreach effort included the following:

Industry Representatives:

Oil and Gas:

Name and Affiliation
Sally Allen, Vice President, Administration & Governmental Affairs Gary Williams Energy Corporation

Agriculture:

Name and Affiliation
Tom Simpson Water Stewardship, Inc.
Don Parrish American Farm Bureau Federation
Deidre Duncan Hunton & Williams LLP, representing American Farm Bureau Federation
John Thorne Crowell & Moring LLP, representing National Agricultural Aviation Association

Construction and Development:

Name and Affiliation
Jerry Passman, Passman Homes National Association of Home Builders State Representative for LA
Trey Pebley, Vice President McAllen Construction, Inc. Associated General Contractors of America Representative
Ed Smariga Buckeye Development, LLC
Tom Farasy Terra Verde Associates
R.L. "Bobby" Bowling IV Tropicana Building Corporation
Matt Carnahan Four Corners Materials
Glenn Roundtree National Association of Home Builders
Jeff Augello National Association of Home Builders
Leah Pilconis, Senior Environmental Advisor to Association of General Contractors

Manufacturing:

Name and Affiliation
Mahta Mahdavi National Association of Manufacturers
Sam Boxerman Sidley Austin LLP, Representing National Association of Manufacturers

Small Government Entities:

Municipal Separate Storm Sewer Systems or Publically Owned Treatment Works:

Name and Affiliation
Stacy Wright, Director of Environmental Health Services City of Farmers Branch, Texas
Heidi Niggemeyer California Stormwater Quality Association Monterey Regional Stormwater Program
Randy Neprash Minnesota League of Cities Stormwater Committee

Small NGOs:

Name and Affiliation
Jennifer McKay, Policy Specialist Tip of the Mitt Watershed Council

SUMMARY OF COMMENTS FROM SMALL ENTITY PARTICIPANTS

At the time the outreach meeting was held, the most recent public statement of policies relating to defining "waters of the U.S." was EPA's draft guidance, so many commenters referred to that as a reflection of the agencies' likely policy choices and as a general baseline for comments.

General Need for Jurisdictional Clarity

The primary concern raised repeatedly by all participants was the need for clarity as to which aquatic resources are jurisdictional and which are exempted from jurisdiction. The current approach of determining jurisdiction on a case-by-case basis can be very time and resource intensive. One participant noted that when pricing projects where there is jurisdictional uncertainty this ambiguity is included in the price quote as well. By providing a clearer definition of what is jurisdictional these time and resource investments could be avoided.

Businesses and property owners may also find themselves in violation of the CWA as they may be unaware that a water they are discharging into is considered jurisdictional. Violators of the CWA are at risk for civil and criminal penalties and providing additional clarity as to which waters are jurisdictional can help companies and landowners minimize their risk.

To help provide jurisdictional clarity participants commonly requested concise definitions for terms that determine jurisdiction such as isolated, adjacent, tributary, and ordinary high water mark. One participant also noted that an erosional feature and an ephemeral stream can have similar characteristics and it is important to have a sharp distinction between the two. Participants also suggested that EPA and the Corps maintain a list of Traditionally Navigable Waters (TNWs) that are considered jurisdictional to help businesses and landowners determine if an aquatic resource is likely to be jurisdictional. Participants recommended that the agencies determine general categories of jurisdictional waters, eliminating the need for case-by-case determinations. The list of features identified as generally not jurisdictional should also be very clear and exhaustive; participants advocated strongly for removal of the term "generally" as it creates unnecessary ambiguity.

Jurisdictional Status of Groundwater

The draft jurisdictional guidance released in May 2011 indicated that when determining if a water could be considered "adjacent", EPA and the Corps could use lateral water flow through a shallow subsurface layer to establish a hydrologic connection to a jurisdictional water. Participants raised concerns that this could be interpreted to mean that groundwater would be considered jurisdictional under the CWA. Several attendees had many concerns as to the implications of groundwater being considered jurisdictional under the CWA as it would impact many of their operations and expose contractors and others to additional CWA liability.

Jurisdictional Status of Ditches

The potential jurisdiction of ditches was of concern to several attendees. In the draft guidance released in 2011 the agencies noted that "ditches that are not tributaries or wetlands" were excluded from jurisdiction. Several entities expressed concern that this policy appears to be a departure from current practice and would significantly expand jurisdiction over ditches, and could make agricultural and roadside ditches jurisdictional. If jurisdiction were to be asserted over these types of ditches there would be significant cost and liability implications.

Impoundments

Impoundments of waters of the U.S. may be considered jurisdictional, but impoundments constructed wholly in uplands are generally not jurisdictional. For example, farm ponds for stock watering constructed wholly in uplands and fed by groundwater would generally not be jurisdictional. Several participants found the discussion in the 2011 draft guidance regarding the jurisdiction of impoundments to be confusing, specifically when it relates to the jurisdiction of farm ponds. One participant suggested that in order to provide as much clarity as possible all preamble language related to impoundments should be housed together.

Implications for Low Impact Design (LID)

LID is being implemented around the country, commonly to control stormwater. Several participants raised concerns that ditches, swales, or other bioretention features may require CWA Section 404 permits for their installation or maintenance. Swales may sometimes utilize wetland plants, which one participant believes makes them more likely to be found jurisdictional, especially over time as they take on more wetland characteristics. The need for multiple permits for the installation and maintenance of LID devices could have significant resource implications for cities and may be a disincentive for their use.

Similarly Situated Waters Approach

The 2011 draft guidance indicated that similarly situated waters are physically proximate other waters (non-wetland waters that would satisfy the definition of "adjacent") in the same point-of-entry watershed and these waters should be evaluated together to determine whether they satisfy the significant nexus standard. A point-of-entry watershed is all waters upstream of and which drain to a TNW or interstate water through a single point-of-entry. One participant noted that this could be interpreted to mean that once a jurisdictional determination is completed for one water in a watershed, it could be interpreted to apply to all of the waters in that watershed. The participant noted significant legal concerns with this policy as, in his opinion, other landowners in the area would not be offered the opportunity for due process. If the agencies used such an approach during rulemaking, the participant recommended that the agencies reach out to other landowners in the watershed when completing a jurisdictional determination.

Interpretation of Supreme Court Cases

Many participants hold strong views regarding how to properly interpret the *SWANCC* and *Rapanos* Supreme Court cases that affect the scope of CWA jurisdiction. There was much discussion during the meeting on this issue and the written comments submitted by participants present their views in detail. Many participants believe the Supreme Court has limited the EPA and the Corps' ability to assert jurisdiction over waters as tributaries based on the presence of an ordinary high water mark (OHWM) or any hydrologic connection to navigable waters. Additionally, many participants believe that the decisions in *SWANCC* and *Rapanos* limit the jurisdiction of wetlands that are adjacent to tributaries and render isolated, intrastate waters nonjurisdictional.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (SISNOSE). The national industry associations in attendance feel strongly that the EPA should complete a regulatory flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel, if the EPA found the rule would have a SISNOSE. In the opinion of the associations, this rule would have a SISNOSE and thus a SBAR Panel should be convened. The associations also believe that a rule to revise the definition of the term "waters of the U.S." would have direct effects on small entities as this change in jurisdiction may require additional small entities to comply with existing CWA programs.

RECOMMENDATIONS AND RESPONSE TO COMMENTS FROM SMALL ENTITY PARTICIPANTS

The following response to comments represent recommendations for how best to address issues raised by small entities consistent with the law and science.

General Need for Jurisdictional Clarity

The primary concern raised by all participants was the need for clarity as to which aquatic resources are or are not jurisdictional.

The agencies' goal is to promulgate a rule which is clear and understandable and which protects the Nation's waters, consistent with the law and currently available science. The agencies believe continuity with the existing regulations, where possible, will reduce confusion and will reduce transaction costs for the regulated community and the agencies. To that same end, the agencies are also proposing, where consistent with the law and science, bright line categories of waters that are and are not jurisdictional. The agencies' practice has been to consider certain categories of waters identified in earlier preambles as not subject to the Clean Water Act, and now this practice will be codified in a rule. This proposal would categorically identify as "waters of the US" traditional navigable waters, tributaries, adjacent waters, interstate waters, and impoundments of jurisdictional waters. As requested by many small entities at this meeting, the agencies are proposing definitions for some of the terms used in the proposed regulation, such as adjacent, tributary and significant nexus. Ordinary high water mark is already defined in regulations (see 33 C.F.R. § 328.3(e)).

The agencies are also identifying categories of waters and wetlands that continue to require a case-by-case significant nexus evaluation to determine whether they are "waters of the United States" and protected by the Clean Water Act. In these cases, current scientific evidence regarding these waters does not provide a basis for a categorical determination, either positive or negative.

Actions to clarify the definition of "waters of the U.S." should increase predictability and minimize the need for case-by-case determinations and are in line with requests from the regulated community, including many small entities.

Jurisdictional Status of Groundwater

Current practice under the 2008 *Rapanos* guidance is that the presence of an unbroken shallow subsurface connection between a water of the United States and a wetland indicates that the wetland is "adjacent." Participants at the small entity meeting raised concerns that this could be interpreted to mean that groundwater would be considered jurisdictional under the CWA.

The agencies emphasize that groundwater is not subject to regulation under the CWA, and the proposal does not change that longstanding statutory interpretation. Although groundwater may be relevant as a connection in a significant nexus determination, the current policies do not assert that the groundwater itself is a water of the US. To help clarify this point, the agencies have added language stating that shallow subsurface flows may be the basis for establishing a connection to waters of the United States without themselves becoming jurisdictional, and that groundwater is never a jurisdictional water. Indeed, the proposal specifically excludes groundwater, including groundwater drained through subsurface drainage systems, from the definition of "waters of the US."

Jurisdictional Status of Ditches

Several entities expressed concern that policies identified in draft guidance would significantly expand jurisdiction over ditches, and could make agricultural and roadside ditches jurisdictional. They noted that if jurisdiction were to be asserted over these types of ditches there would be significant cost and liability implications.

In keeping with long-standing policies, the proposal attempts to more clearly identify which ditches are jurisdictional and which are not. Some agricultural and roadside ditches will continue to be jurisdictional. Tidal ditches are jurisdictional by definition. Ditches excavated in waters of the US continue to be jurisdictional. Non-tidal ditches that meet the definition of tributary and meet certain criteria will be

considered tributaries for the purposes of this rule and will be evaluated as tributaries. Ditches that do not meet the criteria for tributaries specified in the proposal are not considered to be tributaries and therefore cannot be subject to Clean Water Act jurisdiction. Ditches that are excavated wholly in uplands or drain only uplands or non-jurisdictional waters and have less than perennial flow are specifically excluded from jurisdiction. Likewise, ditches that do not connect to the tributary system are explicitly excluded regardless of flow regime.

Impoundments

Impoundments of waters of the U.S. may be considered jurisdictional, but impoundments constructed wholly in uplands are generally not jurisdictional. The agencies do not propose to make any changes to the existing regulatory language with respect to impoundments, "[i]mpoundments of waters otherwise defined as waters of the United States under this definition." The Supreme Court has confirmed that damming or impounding a water of the United States does not make the water non-jurisdictional. *See S. D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them.").

However, for the first time by rule, the agencies are proposing to exclude some waters and features that the agencies have by longstanding practice generally considered not to be waters of the United States. Under the proposal, farm ponds for stock watering excavated wholly in uplands would be specifically excluded from jurisdiction. Specifically, the agencies are proposing that artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing are not waters of the US. Likewise non-jurisdictional would be artificial reflecting pools or swimming pools created by excavating and/or diking dry land; small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; and water-filled depressions created incidental to construction activity.

One of the agencies' goals in this proposed rule is to provide clarity and certainty about the scope of waters of the United States. To that end, they are proposing not simply that these features and waters are "generally" not waters of the United States, but that they are expressly not waters of the United States by rule. Under this proposal, the agencies would not retain the authority to determine that one of these waters was a water of the United States by, for example, finding that the water had a significant nexus pursuant to the other waters provision at (a)(7).

In cases where stock ponds or farm ponds have been excavated from already existing waters of the US, such an impoundment would continue to be a water of the US.

Implications for Low Impact Design (LID)

Several participants raised concerns that swales, or other bioretention features called for by LID may require CWA Section 404 permits for their installation or maintenance. The agencies support the use of LID features. Despite concerns, most LID features, such as rain gardens, are not designed to hold water and would not be considered potentially jurisdictional waters or wetlands.

Similarly Situated Waters Approach

One participant expressed concern that once a jurisdictional determination is completed for one water in a watershed, it could be interpreted to apply to all of the waters in that watershed, and thus deny other landowners in the area the opportunity for due process. It was recommended that the agencies reach out to other landowners in the watershed when completing a jurisdictional determination using the similarly situated waters approach.

The agencies' policy for similarly situated waters is based on its interpretation of Justice Kennedy's opinion in *Rapanos*, which states that a significant nexus exists where a water, either individually or in combination with similarly situated waters in the region, has a more than speculative or insubstantial effect on downstream traditional navigable waters. The rule defines the "in the region" as the "point of entry watershed," that is, the topographic area draining to the nearest TNW or interstate water through a single point of entry. The agencies believe that the point of entry watershed is an

appropriate interpretation of "in the region" for the purposes of applying Justice Kennedy's significant nexus standard.

The rule establishes categories of waters that meet this standard, such as tributaries and adjacent wetlands. Case-by-case significant nexus determinations would be necessary only for "other waters," and thus include only similarly situated "other waters" within a region. A significant nexus evaluation considers only waters, never uplands. The agencies will continue to make decisions on a case-by-case basis; however, previous determinations for similarly situated waters will have a bearing on the outcome.

Interpretation of Supreme Court Cases

Many participants hold strong views regarding how to properly interpret the *SWANCC* and *Rapanos* Supreme Court cases that affect the scope of CWA jurisdiction. There was much discussion during the meeting and in written comments. Some participants believe the Supreme Court has limited the EPA and the Corps' ability to assert jurisdiction over waters as tributaries based on the presence of an ordinary high water mark (OHWM) or any hydrologic connection to navigable waters. Additionally, many participants believe that the decisions in *SWANCC* and *Rapanos* limit the jurisdiction of wetlands that are adjacent to tributaries and render isolated, intrastate waters nonjurisdictional.

The agencies agree that decisions in *SWANCC* and *Rapanos* combined to reduce the historic scope of CWA jurisdiction, and the proposal reflects these decisions. The proposed rule does to a small degree assert CWA jurisdiction over some additional waters when compared to the previous *SWANCC* and *Rapanos* guidances by providing clarification of the agencies' interpretation of the Supreme Court decisions. The proposal does not, however, extend federal jurisdiction to any waters not historically protected under the Clean Water Act and is fully consistent with the law, including decisions of the Supreme Court.

Justice Kennedy explained the *SWANCC* decision in his concurring opinion in *Rapanos*: "In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." The agencies' application of the significant nexus standard avoids Commerce Clause and federalism concerns because the standard is derived from Justice Kennedy's opinion, which explicitly addressed such concerns.

Regulatory Flexibility Act

The national industry associations in attendance felt strongly that the EPA should complete a regulatory flexibility analysis, and complete a formal Small Business Advocacy Review (SBAR) Panel, if the EPA found the rule would have a have a significant economic impact on a substantial number of small entities (SISNOSE). In the opinion of the associations, this rule would have a SISNOSE and thus a SBAR Panel should be convened. The associations also believe that a rule to revise the definition of the term "waters of the U.S." would have direct effects on small entities as this change in jurisdiction may require additional small entities to comply with existing CWA programs.

The agencies disagree with this interpretation. The proposed rule contemplated here is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. 1362(7)), consistent with Supreme Court precedent. This question of CWA jurisdiction will be informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos v. United States*, 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, EPA and the Corps determined to seek early and wide input from representatives of small entities while formulating a

proposed definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions.

Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, at a preliminary stage, about how they should approach this complex question of statutory interpretation.

SUMMARY
Small Entities Outreach Meeting
on the
Proposed Rule for
Redefining Waters of the United States
under the Clean Water Act

Hosted by

US Environmental Protection Agency

October 15, 2014

Meeting Participants

Farming/Agriculture:

Ashley Macdonald National Cattlemen's Beef Association
Kevin Menchey National Cotton Council
Don Parrish American Farm Bureau Federation

Construction and Development:

Scott Berry The Associated General Contractors of America
Tom Farasy Terra Verde Associates
Abigail Jagoda International Council of Shopping Centers
Owen McDonough National Association of Home Builders
Jerry Passman Louisiana Home Builders Association
Leah Pilconis Associated General Contractors of America
Megan Prieto Granite Commercial Real Estate
Ed Smariga Buckeye Development, LLC

Manufacturing:

Chip Yost National Association of Manufacturers

Small Government Entities:

Judy Bock Carlsbad Soil and Water Conservation District
Stacy Wright City of Farmers Branch

Mining:

Laura Skaer American Exploration and Mining Association
Pamela Whitted National Stone, Sand, and Gravel Association

Fertilizer and Pesticide Application:

Allison Donaghy Responsible Industry for a Sound Environment
Laurie Flanagan D.C. Legislative and Regulatory Services
Tom Simpson Water Stewardship, Inc.

Power:

Dorothy Kellogg The National Rural Electric Cooperative Association
Theresa Pugh American Public Power Association

Other:

Tom Delaney Professional Landcare Network (PLANET)
Kia Dennis SBA Advocacy
Robert Helland Golf Course Superintendents

Government:

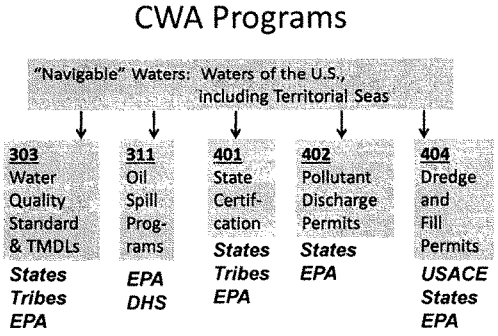
Laura Bachle EPA/OW
Connie Bosma EPA/OW/OWM
Tiffany Crawford EPA/OW/OWOW
David Evans EPA/OW
Erin Flannery-Keith EPA/OW/OWM
Brian Frazer EPA/OW/OWM
Russ Kaiser EPA/OW/WD
Ken Kopocis EPA/OW
Stuart Levenbach and Vlad Dorjets OMB
Gregory Peck EPA/OW/IO
Gautam Srinivasan EPA/OGC
Jenny Thomas EPA/OW/WD

Introduction

The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) have developed a proposed rule defining the scope of waters protected under the Clean Water Act (CWA), in light of the U.S. Supreme court cases, particularly decisions in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers* (*SWANCC*); and *Rapanos v. United States and Carabell v. United States (Rapanos)*. The agencies are undertaking this rulemaking with the goals of increasing CWA program predictability, timeliness, and consistency by increasing clarity regarding the scope of "waters of the United States" covered under the Act, and would enhance protection for the nation's aquatic resources consistent with science and the law.

Waters, including wetlands, found to be "waters of the U.S." under the Act and relevant case law are subject to CWA requirements. Waters that do not meet this definition are not subject to CWA provisions. Exhibit 1 identifies the CWA programs that rely on the definition of "waters of the U.S.", along with the government entities that are responsible for administering the programs. The CWA establishes oil spill prevention programs (Section 311); requires permits for pollutant discharges (Section 402); requires permits for the placement of dredged or fill material in waters of the United States (Section 404); calls for states to set standards for meeting water quality goals and develop plans to restore polluted waters (Section 303); establishes state roles in certifying that federal permits will not violate state water quality standards (Section 401); and provide tools for the federal government, states, and communities to enforce the law.

Exhibit 1. Clean Water Act Programs that rely on the Definition of "waters of the United States."



Recent court rulings and interpretations of water laws have sparked confusion and increased uncertainty regarding which waters are protected under the Clean Water Act, especially for headwater streams and wetlands.

As requested by a diverse group of stakeholders including the agriculture community, environmental and conservation groups, and state and local governments, the EPA and the Corps are seeking to provide clarification via notice and comment rulemaking as to what waters are and are not jurisdictional and thus under the purview of the CWA. The agencies understand that case-specific decisions concerning whether or not a waterbody is subject to the CWA may affect small entities who may, as a result, need to determine whether or not authorization is necessary to discharge pollutants into waterways. The lack of clarity and case-by-case determinations made necessary by *SWANCC* and *Rapanos* have resulted in delays and confusion which the agencies are eager to address in their rulemaking to reduce impacts on the public, including small entities. Small entities also benefit from the functions provided by intermittent, ephemeral and headwater streams and wetlands, such as purifying water and reducing potential treatment costs, reducing flood flows, and assuring reliable and constant supplies of water.

The overall geographic scope of the proposed regulation is narrower than it was before *SWANCC* and *Rapanos*, when the current rule was written. The agencies recognize and agree that the effect of the Supreme Court decisions was to narrow the geographic reach of the Act and the proposed rule reflects that. The scope of the regulations as proposed is narrower than the scope of the existing regulations. The agencies expect, however, that in clarifying the reach of waters under the Act, the proposed rule is likely to result in a slight increase in waters found jurisdictional compared to current practice under the 2008 guidance. The agencies expect the increase to be small, if at all, and occur in the context of improving the process of making jurisdictional determinations more quickly, more predictably, and with greater national consistency. Overall, small entities (and other regulated groups) have emphasized to EPA the importance of clarity, predictability, and consistency for their businesses and for the American taxpayer. In addition, the proposed rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas" (33 U.S.C. § 1362(7)), consistent with Supreme Court precedent.

Additional background on CWA jurisdiction and relevant case law is included in Attachment 1.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. After considering the economic impacts of this proposed rule on small entities, the agencies have certified that this proposed rule will not have a significant impact on a substantial number of small entities.

EPA convened a meeting on October 15, 2014, to exchange information with small entities that may be interested in this action. The meeting was led by representatives from within EPA's Office of Water and was not intended to serve as a small business advisory review panel as defined in Section 609(b) of the RFA. This document includes a summary of comments made by meeting participants. The meeting agenda is included as Attachment 2.

Once completed, the final summary for this outreach meeting will be included in the rulemaking record. Meeting participants were also encouraged to provide specific written comments to EPA directly to ensure that their concerns are captured accurately. EPA is prepared to consider additional changes to the proposed rule in response to public comments, including any comments from small entities.

It is important to note that the findings and discussion in this summary are based on the information available at the time this summary was drafted. The EPA and the Corps are continuing to conduct analyses relevant to the proposed rule, and additional information may be developed or obtained during the remainder of the rulemaking process.

Opening Remarks by EPA

Ken Kopocis, *Deputy Assistant Administrator EPA Office of Water (OW)*, welcomed participants and expressed how important it was to EPA and the Corps to get feedback on the proposed rule from small entity owners and representatives. He noted that EPA has conducted over 350 meetings with stakeholders, including many with small business owners and small entity representatives. He announced that the comment period was extended until November 14, 2014, in part, to allow interested parties to more fully review the report by the Science Advisory Board on the adequacy of scientific and technical basis for the Proposed Rule. He reiterated the Agency's commitment to issuing a final rule in 2015.

Following these opening remarks, Russell Kaiser, *EPA Office of Water,* provided some background information about the proposed rule and the associated court cases as described in Attachment 1.

Summary of Comments from Small Entity Participants

At the time of the meeting, the most recent public statement of policies relating to defining "waters of the U.S." was the proposed rule dated April 21, 2014. Many commenters referred to that document as a reflection of the agencies' likely policy choices and as a general baseline for comments. There were no written materials provided by participants at the meeting.

Call for a SBREFA Panel

Several small entity participants suggested that EPA, the Corps, and small entities would benefit from convening a small business advisory review panel (SBREFA panel), regardless of the determination by EPA and the Corps that the proposed rule would not impact a significant number of small entities. Two participants noted that the October 15th meeting did not "meet the letter or spirit" of the SBREFA

requirements and did not substitute for a SBREFA panel. It was recommended that EPA and the Corps follow the recommendations of the Small Business Advocacy office on this matter.

General Need for Jurisdictional Clarity

The primary concerns raised by small entity participants were related to the need for more clarity in determining which bodies of water are jurisdictional and which are exempted from jurisdiction under the proposed rule. Participants cited several examples of why jurisdictional clarity is important for small entities, including the following:

- Lack of clarity can lead to "legal loopholes" that can be used by some individuals or organizations to stop development or other business activities.
- Land purchasers often have limited time and access to conduct land analyses, so they may not be able to adequately make jurisdictional determinations in the time available. This can make it difficult to decide on whether to make land purchases and to determine the appropriate land price.
- For some businesses (e.g., gravel excavation), there is a perception that all of their work may be subject to case-by-case determinations, which will add time and expense to projects.
- Uncertainty serves as a deterrent to development, because it adds to potential risk. This will serve to slow down the pace of economic recovery. (States like New Hampshire that rely on property taxes will be particularly hard hit.)

The lack of clarity largely stemmed from definitions and applications of key terms such as tributaries, ditches, adjacency, and aggregated or similarly situated (aggregated) waters. Participants recommended that EPA provide more clear and concise definitions of key terms. They also noted that it would be helpful to have a field-specific guide. The guide could include a list of different aquatic resources as well as pictures to illustrate what is and is not jurisdictional. The more guidance and specificity EPA can provide, the easier it will be to avoid jurisdictional questions and issues.

Jurisdictional Status of Ditches

A few participants raised questions about the potential jurisdiction of ditches. In particular, participants asked about the concept of seasonal flow. Previously, if a ditch had met the Scalia test (if it was a perennial or intermittent that had more than seasonal flow) it was considered jurisdictional. The new rule moves away from "seasonal" in defining jurisdictional waters and uses only the term "perennial" to assess flow. The "seasonal" terminology is also used in the 2008 Guidance, which adds to the confusion.

While discussing ditches, participants also raised questions about exclusions in the context of duration and connection to non-excluded waters. It is unclear whether a ditch that is excluded is always excluded or whether it can become jurisdictional at some point in the life of a project (e.g., a ditch that later becomes a wetland because it is no longer maintained and takes on more natural characteristics). It is also not clear whether an excluded ditch could become jurisdictional if it connects other jurisdictional waters.

Aggregated Water Bodies

Some participants expressed concern about the impact of aggregated water bodies on different industries. One participant asked about how the concept of aggregated water bodies or common landscapes applies to linear projects that have several crossings of individual water bodies. There was concern about whether or not utilities would still be able to operate under a general permit if these waters are aggregated. In particular, there is a perception that individual water bodies would be combined and considered a single water body.

Other participants were concerned about how this concept might impact development projects. If a developer is buying a property, it is unclear how a developer would know if there are jurisdictional issues associated with other parcels that may impact the purchased property if it is part of an aggregated feature. This is of particular concern for projects that incorporate new stormwater techniques that lack maintenance and could eventually turn into jurisdictional waters. In addition, developers may not know whether a property that they are developing is part of an aggregated feature even though they may conduct their due diligence.

Finally, one participant asked whose responsibility it is to notify a property owner (who may have owned their land for many years) if a water body on their property is now part of some aggregated feature.

Participants provided the following suggestions in response to the concerns raised about this topic:

- When a jurisdictional determination is made based on similarly situated waters, there should be a communication that goes out to notify those who may be impacted by that determination.
- EPA should develop a Question & Answer document or guidance for specific industry sectors when the final rule is issued.
- There should be a transition period in the enforcement schedule to allow time for affected industries to understand the requirements and move towards full compliance.

Definition of Tributary

Participants were interested in how EPA defined tributaries. There were concerns that the definition of tributary expands jurisdiction over current practice, it will increasingly affect how people use their land. They see the new rule as expanding the definition, which would create problems especially for small business owners who do not have as many resources as larger companies do. Even if the EPA and a regulated entity are in agreement that a body of water is not jurisdictional, vagueness in defining the term could make room for third parties to find reasons to argue that it is indeed jurisdictional.

Adjacency

Several participants had questions regarding what waters adjacent to a floodplain would be jurisdictional. The rule is currently not clear, and there is no additional definition of an adjacent water or any limit to how far a water resource must be from a floodplain to no longer be considered

jurisdictional. Placing limits on the jurisdictional area adjacent to a floodplain or mapping them would clarify exactly which waters would be jurisdictional based on adjacency.

Rule Seen as Expansionary

While EPA has held that the rule would increase exemptions and free bodies of water from jurisdiction, meeting participants felt that the rule would do exactly the opposite. This perspective is based largely on the definitions of key terms. For example:

- The term water is described in a footnote of the proposed rule in a way that seems broader than in the past. The reference to biological connection in particular could make many more waters jurisdictional.
- The concept of adjacency is not well articulated, and it is unclear what adjacent waters would be jurisdictional under the new rule (e.g., an entire riparian area or just a portion).
- The reference to "shallow subsurface water connection" is also unclear and could force some companies to seek case-by-case jurisdictional guidance on all of their projects.

The conflicting viewpoints could be remedied if the rule was made more specific so everyone can easily determine which waters are jurisdictional and how many new aquatic resources will fall under government jurisdiction after the new rule is in effect.

Lack of Clarity Related to Municipal Separate Storm Sewer Systems (MS4s)

One participant emphasized that there was significant confusion about what is or is not regulated under an MS4 permit. Small entities are particularly impacted by this. It was recommended that MS4s be included in the waste treatment exemption.

Possible Effects on Development & Small Businesses

One participant described the proposed rule as "business unfriendly," and many participants expressed concerns about the potential negative impacts on business and development. For example, jurisdictional waters tend to devalue land. This means that developers and business owners may be hesitant to purchase land or build on land because of the risk that property may become devalued because of new jurisdictional determinations.

Businesses that require permits such as pesticide applicators may be reluctant to do their work because of fear and uncertainty related to the proposed rule. Until they get more clarity, they may be reluctant to act. In the case of pesticide applications, this may result in public health impacts if pesticide applicators are reluctant to spray for disease-bearing insects out of concerns over whether or not they are in compliance or concerns about citizen action suits.

The golf industry expressed concern that the proposed rule could result in a "taking" under the Constitution because many of their properties would not be able to engage in their normal activities if the rule was made final as written. They therefore would face the real risk of going out of business. If the rule is not changed, water bodies that were previously not jurisdictional under the Clean Water Act would now become jurisdictional, affecting activities done, over or near those water bodies. There is no

guarantee that a business can get a CWA permit, and the consequences for failing to have a permit can be severe.

How the Rule will be Implemented

Meeting participants raised concerns regarding whether or not bodies of water would be grandfathered. For example, a water body could have been determined to be non-jurisdictional and then become subject to jurisdiction when the rule is released. The question is whether the jurisdiction will change or if the jurisdictional determination will apply to the life of the determination.

Participants were concerned that this rule would lead to an increase in case-by-case determinations of jurisdictionality. This will require some companies to hire consultants and engineers to make these determinations, but many smaller businesses do not have the necessary resources to acquire these services. This means that small operators may not have the capacity to make these determinations. Similarly, one participant expressed concern that small businesses would face (with increased frequency) the burden of proving on a *case-by-case basis* the application of certain exclusions from the "waters of the US" definition (e.g., water-filled depressions created incidental to construction). Old maps and aerial photos may be the only sources available to identify historic conditions in order to resolve alleged violations of federal CWA laws. Small business operators may not have the resources available to produce this type of information.

Several participants also noted that there is a broad network of organizations and individuals involved in implementing the proposed rule. EPA needs to not only make sure it has the resources to implement the rule, but it also needs to provide its state and local partners with the resources they need to understand it and implement it consistently. This is already playing out in one state that has decided to change the point of compliance for one entity's permitted discharge. The change is being made as a result of evolving understanding of the definition of "waters of the U.S."

Attachment 1: Background

Clean Water Act programs are applicable to all "navigable waters" which are defined in the statute as the "waters of the United States, including the territorial seas." The definition of "waters of the United States" is used in the implementation of all CWA programs including Sections 303, 311, 401, 402, and 404. The EPA is charged with overseeing implementation of all Clean Water Act programs, including Section 404. The Army Corps of Engineers administers the Section 404 program for discharges of dredged or fill material into jurisdictional waters, and makes the majority of jurisdictional determinations.[1]

After the Clean Water Act was amended in 1972, the EPA and the Corps promulgated regulatory definitions of "waters of the U.S.," and by 1979 EPA's definition looked substantially similar to what it is today. In 1982, the Corps adopted EPA's definition. The regulations define "waters of the U.S." as including waters that are:

- traditionally navigable
- interstate
- could affect interstate commerce if used, degraded, or destroyed
- territorial seas
- impoundments of jurisdictional waters
- tributaries of jurisdictional waters
- wetlands adjacent to jurisdictional waters.

The agencies' regulatory definition of "waters of the U.S." includes exclusions for waste treatment systems and prior converted cropland.

The U.S. Supreme Court addressed the scope of waters of the United States protected by the CWA in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), which involved wetlands adjacent to a traditional navigable water in Michigan. In a unanimous opinion, the Court deferred to the Corps' judgment that adjacent wetlands are "inseparably bound up" with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of "waters of the United States." The Court observed that the broad objective of the CWA to restore the integrity of the nation's waters "... incorporated a broad, systemic view of the goal of maintaining and improving water quality .... Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' In keeping with these views, Congress chose to define the waters covered by the Act broadly." *Id.* at 133 (citing Senate Report 92-414).

The issue of CWA regulatory jurisdiction over "waters of the United States" was addressed again by the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159* (2001) *(SWANCC)*. In *SWANCC,* the Court (in a 5-4 opinion) held that the use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The Court noted that in the *Riverside* case it had "found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States'" and that "[i]t was the

[1] States and tribes may be approved to administer the Clean Water Act Section 404 program. Michigan and New Jersey currently implement the 404 program.

significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA" in that case. *Id.* at 167, 167. *SWANCC* did not directly address other parts of the regulatory definition of "waters of the United States."

Five years after *SWANCC*, the Court again addressed the CWA term "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water. . ." *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *id.* The *Rapanos* plurality noted that its reference to "relatively permanent" waters did "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months . . . ." *Id.* at 732 n.5.

Justice Kennedy's concurring opinion took a different approach than Justice Scalia's. Justice Kennedy concluded that the term "waters of the United States" encompasses wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167). He stated that wetlands possess the requisite significant nexus if the wetlands, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780. Kennedy's opinion notes that such a relationship with navigable waters must be more than "speculative or insubstantial." *Id.* The "significant nexus" test for CWA jurisdiction that Justice Kennedy's opinion applied to adjacent wetlands also can and should be applied to other categories of water bodies (such as tributaries to traditional navigable waters or interstate waters, and to "other waters") to determine whether they are subject to CWA jurisdiction, either by rule or on a case-specific basis.

In *Rapanos*, the four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. *Id.* at 810 & n.14 (Stevens, J., dissenting). Neither the plurality nor the Kennedy opinion invalidated any of the regulatory provisions defining "waters of the United States." When there is no majority opinion in a Supreme Court case, controlling legal principles may be derived from those principles espoused by five or more justices. Thus, regulatory jurisdiction under the CWA exists over a water if either the plurality's or Justice Kennedy's standard is satisfied.

The two *Rapanos* standards have been difficult to put into practice for both the regulated community who seek permits and for agency field staff. EPA and the Corps proposed draft guidance to provide clearer, more predictable guidelines for determining which water bodies are protected by the Act. Many comments received on the proposed guidance urged the Corps and EPA to update their regulation defining waters of the U.S. Supreme Court justices in the *Rapanos* decision similarly urged rulemaking.

Small Entities Meeting on the

Waters of the United States Proposed Rulemaking

AGENDA

October 15, 2014, 1:30 PM – 4:00 PM

US EPA Headquarters Room 3233 William Jefferson Clinton East

Call-in Number 1-866-299-3188 conference code: 2025662468

Objectives

- Provide invited small entity representatives with background and information about the Clean Water Act and the Waters of the United States Proposed Rule
- Review responses to comments from the 2011 small entity outreach engagement
- Solicit input from participants on their questions, concerns and suggestions regarding the Proposed Rule

Agenda

1:30 – 1:45 Welcome, Introductions and Meeting Guidelines (Facilitator)

1:45 – 2:30 Opening Remarks and Presentation by US EPA

2:30 – 3:45 Open Discussion (Facilitator)

Participants will be invited to ask clarifying questions about the opening presentation and provide comments on the Proposed Rule. Participants will be encouraged to think about the following:

- *What aspects of the Proposed Rule do you find particularly confusing or problematic? Why?*
- *What suggestions do you have for how the Proposed Rule could be clarified or improved?*
- *What impacts do you anticipate the proposed rule having on your business in terms of your need to file for a Clean Water Act permit?*
- *What benefits do you see that might result from the Proposed Rule as written?*

3:45 – 4:00 Wrap-Up, Next Steps (Facilitator)

5/19/2015

Opinion: Protecting Clean Water For Our Families, Communities And Businesses | Fox News Latino

http://latino.foxnews.com/latino/opinion/2014/05/05/opinionprotectingcleanwaterforourfamilies-communitiesbusinesses/print

Opinion: Protecting Clean Water For Our Families, Communities And Businesses By Ruben Guerra

Published May 05, 2014 | Fox News Latino

When I was 10, my father would take us kids to Bakersfield every day in the summertime to pick fruits and vegetables. We'd then sell those watermelons and oranges in East L.A. That experience was the start of my entrepreneurialism, and it sparked my concern for our environment. I believe it is important that our government protect clean water, which is essential for our families, communities, and businesses.

In Los Angeles County, approximately one third of our drinking water comes from the San Gabriel Mountains, which is a key reason why there is strong congressional and community support to permanently protect the San Gabriel Mountains and watershed.

Throughout the state of California, we have a tragic history of inequity when it comes to clean water. For many Latino communities especially, industrial pollution and water contamination is pervasive. Ensuring all people can access safe drinking water is an American value and the driving force behind the community led "Human Right to Water" law in California, which said, "Every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes."

A new rule from the Obama Administration continues these efforts to protect our clean water. Called "Waters of the US" the proposed new rule from the Environmental Protection Agency was announced March 25 after years of study and consultation. If enacted, the rule would protect the streams that flow into our rivers, farms, and drinking water supplies from toxic pollution. It clarifies that these headwaters streams and wetlands are again entitled to protection under the Clean Water Act.

For years, uncertainty about which bodies of water are protected by law created loopholes that put our clean water supplies at risk. Several confusing Supreme Court rulings meant no protection from pollution for the headwaters streams and wetlands that provide drinking water for 1 in 3 Americans.

The "Waters of the US" rule clears up that confusion by safeguarding the sources of our water supplies and ensures every community and every American is again entitled to clean water.

Latino farmers and farmworkers depend on clean water and sustainable farming practices to produce healthy food. Clean water is critical for businesses that manufacture goods, and those that simply provide clean water for their employees' morning coffee. It is perhaps most important to have clean water for our families, and the riverside parks and waterways where our children play.

For the Latin Business Association and the 800,000 Latinoowned businesses we represent, the rule simply makes sense. Business depends on certainty – whether you are selling watermelons or widgets. This rule provides certainty for businesses that need to know where the reach of the law begins and ends, and that the source of their water supplies will be protected.

The public has been invited to comment on the rule through the end of July. I urge the Obama administration to finalize this rule and protect clean water for us all.

http://latino.foxnews.com/latino/opinion/2014/05/05/opinionprotectingcleanwaterforour-familiescommunitiesbusinesses/

National Farmers Union
UNITED TO GROW FAMILY AGRICULTURE

September 22, 2014

Water Docket
Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Ave. NW.
Washington, DC 20460
Docket ID No. EPA-HQ-OW-2011-0880

Attention: Docket ID No. EPA-HQ-OW-2011-0880: Definition of "Waters of the United States Under the Clean Water Act"

Dear Administrator McCarthy and Lieutenant General Bostick:

National Farmers Union (NFU) welcomes the opportunity to submit comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) on the proposed rule regarding the definition of "waters of the United States" under the Clean Water Act (CWA). As this rulemaking process continues, NFU may submit additional comments.

Since 1902, NFU has advocated for the economic and social well-being and quality of life of family farmers and their communities through the sustainable production of food, fiber, feed and fuel. NFU represents nearly 200,000 members nationwide, with members in all 50 states and organized divisions in 33 states. NFU is a federation of state and regional organizations.

Clean water is vital to the productivity and well-being of America's farms, ranches and rural communities. The CWA seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters.[1] NFU's members understand the importance of respecting clean water as a shared resource and believe the integrity of the nation's water can be protected without unnecessarily encumbering the activities of the regulated community. NFU's policy, enacted annually by delegates to the organization's national convention, opposes broadening the definition of what waters are considered jurisdictional[2] and supports the uniform administration of EPA policies nationwide.[3]

[1] 33 USC §1241(a).
[2] Nat'l Farmers Union, *2014 Policy of the National Farmers Union* 61 (2014) *available at* http://nfu.org/images/03%2011%2014%20FINAL%202014%20POLICY%20CLEAN%20COPY.pdf
[3] *Id.* at 59.

The EPA and Corps' (agencies) stated goal for the proposed rule is to improve protection of public health and water resources while increasing certainty for the regulated community and reducing troublesome and costly litigation. Protecting the nation's water resources is a complicated matter, and so by necessity are the CWA and any rule implementing it. This topic requires careful consideration and measured discourse over the legitimate concerns facing the regulated community. This proposed rule is so important because all discharges made to waters of the United States from point sources require a National Pollutant Discharge Elimination System (NPDES) Permit under the CWA. A discharge is any addition of a pollutant to a "water of the United States," including dredge or fill material. Although normal farming, silviculture and ranching activities are exempt from dredge and fill requirements under §404(f)(1)(A) of the CWA and certain activities pursuant to agriculture are exempted from NPDES permitting requirements under §402, the legal basis for the regulation of many construction and business activities rests on the definition of "waters of the United States."

It is not satisfactorily clear whether the proposed rule, in its present form, would implement policies that NFU supports. However, NFU's members recognize the agencies' rulemaking process on this matter as an opportunity to achieve their policy goals because the current regulatory landscape allows for inconsistent determinations that expand the CWA's definition of jurisdictional waters. The purpose of the following comments is to provide the agencies with advice for drafting a final rule that does not increase CWA jurisdiction and promotes consistent application of EPA policies, which aligns with the agencies' stated intent. NFU will oppose a rule that does not respect these critical components of the organization's policy. These comments will help the agencies avoid language that, even when drafted in good faith, could be taken out of context and used to stretch CWA jurisdiction in the future.

The agencies' stated intent is to replace inconsistent practices with clear, bright-line tests through this proposed rule. If the comments below are given proper consideration, the final rule will allow the regulated community the certainty it needs to conduct its business free from fear of undue regulatory interference and without sacrificing the agencies' ability to protect the United States' water resources. The proposed rule warrants comments on the agencies' changes to the definition of "waters of the United States" and the exclusions of certain waters from that definition.

I. Proposed Definition of "waters of the United States."

"Tributary"

The CWA establishes the agencies' permitting jurisdiction over specifically-listed waters. Paragraphs (a)(1)-(a)(5) of the proposed rule restate well-settled tenets of the agencies' jurisdiction under the CWA and do not warrant further comment. However, section (a)(5)'s inclusion of "All tributaries of waters identified in paragraphs (a)(1) through (4) of this section" warrants examination. This language has

invoked significant concern in the regulated community that the proposed rule would increase the jurisdictional reach of the CWA. The agencies should address this concern and confirm this language does not increase jurisdiction by incorporating the following points in the final rule.

The preamble to the proposed rule notes that the proposed rule sets forth, for the first time, a regulatory definition of "tributary."[4] The proposed rule defines "tributary" as "a water physically characterized by the presence of a bed and banks and ordinary high water mark. . . which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section."[5] In order to provide more clarity to the regulated community, the agencies should note in the final rule that these features take years to form. This should mitigate concern that temporary accumulations directly related to isolated rain events will be considered jurisdictional. The agencies should add further clarifying language, including but not limited to descriptive examples of water and events that are not considered tributaries, in the final rule in order to ensure these distinctions are well-understood in the regulated community.

The preamble notes that existing Corps regulations define the ordinary high water mark (OHWM) "as the line on the shore established by fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. 33 CFR 328.3(e)."[6] The agencies should incorporate this definition within the final rule so that the regulated community can refer to one place for as much of the information that is needed to maintain compliance as possible.

These points should ensure that the definition of "tributary" in the proposed rule will not bring any water into jurisdiction that would not be found jurisdictional under the "significant nexus" test that is applied to "other waters." If incorporated, they would create regulatory certainty and lessen administrative burden by settling jurisdiction for waters that would have been subject to a case-by-case determination but ultimately found jurisdictional.

Also, the proposed rule treats wetlands that are connected to tributaries as tributaries themselves, but the preamble requests comment on this approach and offers an alternative.[7] Wetlands should not be considered tributaries. Treating wetlands as tributaries would negate the bed, bank and OHWM criteria

[4] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22198,(proposed April 21,2014) (amending 33 C.F.R. §328.3).
[5] *Id.*,at 22263.
[6] *Id.* .at 22202.
[7] *Id.* at 22203

the Corps uses for identifying tributaries. The agencies should enact the alternative proposed in the preamble and "clarify that wetlands that connect tributary segments are adjacent wetlands, and as such are jurisdictional waters of the United States under (a)(6)." This alternative creates a bright-line definition for "tributary" without relinquishing any opportunities to protect water resources.

"Adjacent"

The proposed rule would change section (a)(6) from an articulation of the CWA's jurisdiction over wetlands adjacent to "waters of the United States" to an explanation of the CWA's jurisdiction over "All waters, including wetlands, adjacent to" waters identified in (a)(1) to (a)(5) as jurisdictional. As with the definition of "tributary" discussed above, this change is causing apprehension among the regulated community. The agencies should consider the following points in drafting the final rule to make clear that this change does not expand jurisdiction.

The proposed rule defines "adjacent" as "bordering, contiguous or neighboring" at (c)(1). It notes further that "Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent waters.'"

The jurisdictional reach of "adjacent waters," then, is largely dependent on the definition of "neighboring." This proposed rule defines "neighboring" for the first time. The preamble notes that the term is currently applied broadly, but the proposed rule defines "neighboring" as "waters located within the riparian area or floodplain of a water identified in (a)(1) through (5) of this section, or waters with a shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water."[8]

Waters located in the riparian area or floodplain of a jurisdictional water, or with a confined surface hydrologic connection to a jurisdictional water, would be found jurisdictional under the "significant nexus" test, even without the proposed rule's explanation of jurisdiction over adjacent waters. This inclusion of "adjacent waters" as per se jurisdictional increases certainty for the regulated community and alleviates administrative burden without increasing the CWA's jurisdictional reach.

The preamble explains that, to date, the agencies' professional judgment has been a factor in determining matters of adjacency. "The agencies recognize that this may result in some uncertainty as to whether a particular water connected through confined surface or shallow subsurface hydrology is an 'adjacent' water." The preamble then specifically requests comments on options for providing clarity and certainty on these matters.

[8] *Id.* at 22207.

One of the proposed alternatives put forth by the agencies is "asserting jurisdiction over adjacent waters only if they are located in the floodplain or riparian area of a jurisdictional water."[9] This is the proper way to address these waters. It creates certainty for the regulated community since waters located a substantial distance from a jurisdictional water would not be subject to jurisdiction due to an insubstantial connection to the jurisdictional water. Even in the current regulatory framework, the agencies consider distance from a jurisdictional water when determining whether a water that is located outside the floodplain or riparian area of the jurisdictional water, but that is connected to the jurisdictional water by a shallow subsurface or confined surface hydrologic connection, is adjacent to that jurisdictional water.[10]

This alternative also reserves to the agencies the ability to address waters that could actually have a consequential impact on the quality of a water of the United States, since the water located outside the floodplain and riparian area of the jurisdictional water, unless otherwise excluded, would be subject to the "significant nexus" test. Holding the definition of "adjacent water" to waters within a jurisdictional water's floodplain or riparian area allows the regulated community maximum certainty without encumbering the agencies' ability to protect water resources.

The agencies also request comment on whether a water with only a small confined surface or shallow subsurface hydrologic connection to a jurisdictional water should be exempt if it is outside a specified distance from the jurisdictional water. For the same reasons why the best approach to "adjacent waters" is to limit the category to waters within the floodplain or riparian area of a jurisdictional water as discussed above, placing a cap on the distance from a jurisdictional water within which other waters may be considered "adjacent" is a second-best alternative. Under this approach, more waters that do not have the actual ability to affect the water quality of a jurisdictional water will be considered jurisdictional than the "floodplain and riparian area-only" alternative. This will result in greater administrative burden for the regulated community and the agencies. However, a bright-line rule limiting the area surrounding a jurisdictional water in which a water may be found "adjacent" could still be referenced, increasing certainty compared to the regulatory framework as it exists today.

The preamble also asks for specific comment "on whether the rule text should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water."[11] The agencies should uniformly use a 20 year flood interval zone when evaluating these waters. This will provide the regulated community with certainty without inhibiting the agencies' ability to protect waters of the United States, since waters not captured within this zone will still be

[9] *Id.* at 22208.
[10] *Id.*
[11] *Id.* at 22209.

jurisdictional under the "significant nexus" test if they have the potential to impact a jurisdictional water.

The agencies should also provide clarity to the regulated community by stating in the final rule, "mere proximity to a jurisdictional water is not cause for a determination that a water is jurisdictional as 'neighboring' or 'adjacent,' and a scientifically-verifiable, substantial surface connection must be present for any water outside a floodplain or riparian zone to be found jurisdictional."

"Significant Nexus"

Other waters not covered by the above-discussed jurisdictional categories may fall within the CWA's jurisdiction if a case-by-case determination is made finding the water has a "significant nexus" with a water identified in sections (a)(1) through (3).

The proposed rule at section (c)(7) says "The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs(a)(1) through(3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section." The proposed rule also states "Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a 'water of the United States' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through(a)(3) of this section." The agencies intend that this language more precisely describes the scope of jurisdiction by explicitly leaving out waters that have a mere commercial connection to navigable waters and codifies the agencies' practice since the Supreme Court's decision in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).

The term "similarly situated" must be examined, since it allows the agencies to consider multiple waters together in making "significant nexus" determinations. The prerequisite condition for "other waters" to be considered "similarly situated," before any assessment of geographic proximity to additional "other waters" or jurisdictional waters, is performance of similar functions. The preamble further explains that a "similarly situated" determination requires an evaluation of whether waters in a region "can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas," and whether waters are "sufficiently close" to each other or a jurisdictional water.[12]

[12] *Id.* at 22213.

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The description of "similarly situated" waters above includes so many variables that it would be difficult for the regulated community to accurately anticipate the outcome of such a determination, opening the door to increased uncertainty. To give the regulated community more clarity in anticipating the results of "similarly situated" evaluations, the agencies should provide a list of functions that a group of waters must perform together in order to be considered "similarly situated." These functions include affecting the reach and flow of a jurisdictional water and allowing or barring the movement of aquatic species, nutrients, pollutants or sediments to a jurisdictional water.

The agencies should also require "other waters" to have a confined surface connection to each other in order to be considered "similarly situated." This distinction would be helpful to the agencies and to the regulated community because "other waters" that are completely separate and distinct from a jurisdictional water will not be able to form a significant nexus with a jurisdictional water cumulatively unless they maintain such a nexus individually or with each other. The final rule should also strictly limit the distance allowed between separate waters that can be considered "similarly situated."

Otherwise, no "other waters" should be determined to be similarly situated, as the agencies put forth as an alternative in the preamble.[13] The limited environmental benefit of bringing waters that would not trigger jurisdiction by themselves into jurisdiction as "similarly situated" does not justify the uncertainty and administrative burden that would be created for the agencies and the regulated community. The "significant nexus" evaluation ensures that waters of genuine concern are jurisdictional.

This added clarity would ease concerns regarding the rule held by NFU members in the Prairie Pothole Region, in which a farm may be littered with potholes. In many cases, a pothole may be located near a jurisdictional water and have a physical surface connection to that jurisdictional water. Another pothole may be located near to the first pothole and yet have no connection to it. The agencies should assure farmers the second pothole, even though it is near to the first pothole, will not automatically be considered "similarly situated" to the first pothole strictly due to geographic proximity. At the very least, the final rule should clarify that the term "similarly situated," for purposes of determining whether "other waters" maintain a "significant nexus" with jurisdictional waters, is not a simple geographic determination. The agencies should elaborate that "similarly situated" means both waters that are near to each other and sharing an identifiable hydrogeological feature in common. A water would not be considered "similarly situated" due to geographic proximity alone.

The agencies request comment as to whether the agencies should evaluate all "other waters" in a single point of entry watershed as a single landscape unit for purposes of determining whether these "other

[13] *Id.* at 22215.

waters" are jurisdictional.[14] This would create substantial negative economic impact by unduly imposing a regulatory burden on many waters that cannot affect the integrity of "waters of the United States." It would also increase the agencies' administrative load without a return of environmental benefit, since the agencies would have to perform more case-by-case jurisdictional determinations. Since this approach to evaluating "other waters" would create significant administrative burden for the agencies and the regulated community, and would not produce an environmental benefit, the agencies should not include this approach in the final rule.

Additional Clarity

The agencies can alleviate agriculture's concerns by noting that waters not listed under section (b) of the proposed rule are not jurisdictional by default and will not be considered within CWA jurisdiction unless they fall into one of the categories listed in sections (a)(1) to (a)(7).

The agencies should also make clear in the final rule that any wetland determination made by the Department of Agriculture's Natural Resource Conservation Service (NRCS) will be considered final and ruling. While NRCS' wetlands determinations are not jurisdictional determinations, the ability to rely on NRCS' decisions regarding the presence of a wetland would increase clarity for the regulated community, reduce the agencies' administrative burden and prevent inconsistent wetland determination.

II. Excluded Waters and Exempted Activities

Ditches

In section (b) of the proposed rule, the agencies list several categories of waters that are explicitly excluded from the definition of "waters of the United States," placing them outside the jurisdiction of the CWA. The proposed rule specifically excludes two types of ditches that otherwise would have been subject to a case-by-case determination, increasing regulatory certainty and reducing the CWA's jurisdictional reach. The exclusion of these ditches increases certainty for the regulated community without impairing the agencies' ability to protect the nation's water resources.

Sections (b)(3) and (b)(4) explain the circumstances in which a "ditch" is not a "water of the United States." These sections exclude ditches that do not contribute flow, directly or through other waters, to a "water of the United States," and any ditches that are wholly within an upland and drain only uplands and are without perennial flow. These explicitly-stated exclusions do not interfere with the CWA's objective of protecting water resources because the ditches concerned are unlikely to impact the

[14] *Id.* at 22217.

integrity of waters of the United States. The exclusions at (b)(3) and (b)(4) will give the regulated community added certainty, allowing them to conduct their business without fear of regulatory action.

With regards to section (b)(3), the preamble states "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)."[15] The agencies should restate this description of "upland ditches" as a definition of "uplands" by writing, "an upland is any land that is not a wetland, floodplain, riparian area or water." This definition should be included in the final rule in order to provide clarity.

The agencies should provide further clarity to the regulated community by defining "perennial flow" in section (c) of the final rule. The description of "perennial flow" in the preamble[16] could be altered slightly to function as the definition, codifying that "perennial flow" is "the presence of water in a tributary year round when rainfall is normal." Including this definition in the final rule would reduce the administrative burden for members of the regulated community as they attempt to maintain compliance with the CWA.

The agencies request comment on whether perennial flow is the proper distinction to use in separating excluded ditches from ditches that may be jurisdictional under section (b)(3).[17] Given the agencies' stated goal of providing clarity to the regulated community, perennial flow is the proper distinction. The presence or absence of perennial flow is easily-verifiable. Using perennial flow as the distinction allows the regulated community to be confident in their own assessment of ditches, which encourages the normal course of business and reduces unexpected enforcement actions. It also checks the agencies' administrative burden, since the presence or absence of perennial flow would also be easier for the agencies to verify than intermittent flow.

Exemptions for Agricultural Activities

The preamble indicates that the proposed rule does not affect existing regulatory exemptions for agricultural activities.[18] There is nothing in the proposed rule that calls this assertion into question. Some of these exemptions are referenced in the Interpretive Rule Regarding Applicability of the Exemption from Permitting under section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices" (Interpretive Rule), which was published on the same day as the proposed rule.[19] The Interpretive Rule states the list of exempted practices is illustrative rather than exhaustive

[15] *Id.* at 22219.
[16] *Id.* at 22203.
[17] *Id.* at 22219.
[18] *Id.* at 22218.
[19] http://www2.epa.gov/sites/production/files/2014-03/documents/cwa_section404f_interpretive_rule.pdf

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and the CWA exempts those, like other activities conducted in the normal course of agriculture production, including conservation activities, are also exempted from CWA permitting requirements. In order to provide the regulated community with increased certainty, the agencies should consider codifying the Interpretive Rule and adding language explicitly stating that engaging in these exempted activities does not invoke any reporting requirement or other obligation to the agencies, including when these activities take place on land newly brought into farming. The agencies should also explicitly note that conservation activities do not need to follow specific National Resource Conservation Service guidelines for cost-share or technical assistance eligibility when engaging in these activities in order for their actions to remain exempt from permitting requirements.

The proposed rule also specifically continues the exclusion of prior converted cropland from the definition of "waters of the United States" at section (b)(2). The proposed rule and preamble's direct confirmation of these matters provides clarity for the regulated community. The agencies should provide further clarity for the regulated community on this point by stating in the final rule, "This rule does not require a permit for any plowing and planting activity that was legally conducted without a permit before this rule was issued." This language captures the intent of the agencies and provides the regulated community with the certainty it needs to continue farming its existing planted acreage without threat of new interference.

III. Miscellaneous Matters

Shallow Subsurface Hydrologic Connections

The existing regulatory framework defining "waters of the United States" and the proposed rule assume that a shallow subsurface hydrologic connection is sufficient for finding that waters with this connection to a jurisdictional water are "neighboring" and so jurisdictional themselves as "adjacent waters." Hydrologic science does not support such a uniform determination. Shallow subsurface hydrologic connections should be carefully studied to assess their impacts on jurisdictional waters, and the perennial nature of many of these connections should be taken into account. Further research must be conducted before the agencies determine which, if any, subsurface hydrologic connections can be considered sufficient grounds for finding such waters "adjacent" to jurisdictional waters. Until more scientific evidence is provided, groundwater connections alone should not be used to find non-navigable waters jurisdictional.

Pesticide Applications

The proposed rule does not address pesticide applications other than applications directly to a jurisdictional water. Similarly, it is clear that the proposed rule does not specifically address fertilizer

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applications. This is not the proper venue for discussing these applications. Future opportunities will arise to work with EPA on these topics, especially the problem of redundant CWA and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) regulations governing pesticide applications.

Army Corps' Engagement

Given the importance of this rule to the regulated community, the Corps' lack of participation in discussion of this proposed rule is frustrating. The Corps is ultimately tasked with jurisdictional determinations under the final rule. The Corps' refusal to provide any insight on how it plans to interpret and implement the proposed rule undermines the regulated community's confidence that our good faith involvement in the rulemaking process will result in adequate consideration of our help when jurisdictional determinations will actually be made. The Corps must join this discussion immediately.

IV. Conclusion

NFU understands the agencies' stated goal of enhancing protections for our nation's water resources while providing increased certainty to the regulated community. The comments above reflect NFU's understanding of the proposed rule and explain ways the proposed rule could be improved to more effectively accomplish the agencies' stated goal in the final rule while maintaining conformity with NFU's policy. NFU stands ready to offer further assistance in this regard as the agencies may find helpful. Thank you for your consideration of these comments.

Sincerely,

Roger Johnson
President

Before the Senate Small Business Committee

Hearing Examining How Proposed Environmental Regulations

Would Affect America's Small Businesses

Statement for the Record of the National Wildlife Federation

on the Clean Water Act "Waters of the United States" Rulemaking

May 18, 2015

The National Wildlife Federation (NWF) submits this statement for the hearing record in strong support of the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") Clean Water Rule defining "Waters of the United States" under the Clean Water Act.

As we document in our statement below, this rule clarifying and restoring Clean Water Act protections fosters strong local economies and millions of jobs. Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs.

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation, including boating, fishing and wildlife watching, represent billions of dollars in commerce. These fishing and river guides, outfitters, bait shops, hotels and coffee shops are true small businesses that form the backbone of many rural communities. And they depend upon clean water and healthy wetlands, lakes, and streams.

NWF represents over 4 million conservation-minded hunters, anglers, and outdoor enthusiasts nationwide. Conserving our Nation's wetlands, streams, and rivers is at the core of our mission. We have been active in advocating for Clean Water Act protections since the Act was passed in 1972. **For the reasons summarized below, we support this rigorous and transparent rulemaking and strongly oppose any legislative effort to delay or derail this much-needed Clean Water Rule.**

With the recent water pollution threats to drinking water from Ohio and West Virginia to Iowa and Montana, we would hope that the House and Senate committees of jurisdiction would convene to consider meaningful solutions to fix these pressing problems. Instead, they seem bent on providing a platform to belittle and undermine the landmark 1972 Clean Water Act. These events remind us of the high value of clean water, and crystallize the need to improve the Clean Water Act, not weaken it.

The Clean Water Act has been successful at improving water quality and stemming the tide of wetlands loss in every state. However, Clean Water Act safeguards for streams, lakes and

wetlands have been eroding for over a decade following two controversial Supreme Court decisions which cast doubt on more than 30 years of effective Clean Water Act implementation.

For more than a decade now, 60 percent of stream miles in the United States, which provide drinking water for more than 117 million Americans, are at increased risk of pollution and destruction. Wetlands are at risk as well. In fact, the rate of wetlands loss increased by 140 percent during the 2004-2009 period – the years immediately following the Supreme Court decisions. This is the first documented acceleration of wetland loss since the Clean Water Act was enacted more than 40 years ago during the Nixon administration.

When wetlands are drained and filled and streams are polluted, we lose the ability to pursue our outdoor passions and pass these treasured traditions on to our children. Moreover, pollution and destruction of headwater streams and wetlands threaten America's hunting and fishing economy – which accounts for over $200 billion in economic activity each year and 1.5 million jobs, supporting rural communities in particular.

We respectfully submit this statement for the hearing record emphasizing the following key points from our formal rulemaking comments:

1. **This rule is needed and offers the best opportunity in a generation to clarify the waters that are – and are not – subject to clean water act protections.**

The Waters of the United States rule is necessary to revise the longstanding definition of "waters of the United States" subject to the Clean Water Act in light of the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers ("SWANCC")*,[1] and *Rapanos v. United States.*[2]

The final rule must address the *SWANCC* and *Rapanos* decisions in a manner that is consistent with the Clean Water Act, its goals, and the applicable aquatic ecosystem science. Such a revised regulation will establish a binding rule that will provide for restoring longstanding clean water protections, and will provide greater certainty and consistency in jurisdictional determinations for landowners, agency field staff, and the courts. Rule-making to address this definition was clearly called for by at least two of the Supreme Court Justices in their *Rapanos* concurring opinions: Chief Justice Roberts[3] and Justice Breyer.[4]

2. ***Swancc, Rapanos*, and subsequent agency guidance have created a decade-long untenable status quo of uncertainty, confusion, wasteful litigation, and lost clean water protections.**

The 2001 *SWANCC* decision was narrow. It simply precluded the Corps from asserting jurisdiction over certain ponds based solely on their use by migratory birds. It did not overturn any aspect of the existing waters of the U.S. regulatory definition, including the broad (a)(3) "other waters" provision. Nevertheless, in 2003, the Bush Administration's EPA issued SWANCC guidance (immediately effective ***without advance public notice and comment***) with an advanced notice of proposed rulemaking to potentially remove from Clean Water Act jurisdiction many non-navigable, intrastate wetlands, streams and other waters. **That spring, 39**

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[1] 531 U.S.159 (2001).
[2] 126 S. Ct. 2208 (2006).
[3] 547 U.S. at 757-58.
[4] 547 U.S. at 812.

state agencies and hundreds of thousands of individuals and organizations submitted comments urging the EPA and the Corps not to reduce the historic scope of waters protected under the Clean Water Act. Later that year, over 200 members of Congress from both parties (including Rep. Paul Ryan among others) wrote a letter to President Bush urging him "not to pursue any policy or regulatory changes that would reduce the scope of waters protected under the Clean Water Act." In the face of such strong opposition, the Bush Administration abandoned its rulemaking to reduce the scope of waters covered by the Clean Water Act, but retained the SWANCC Guidance, effectively removing CWA protections for an estimated 20 million so-called "isolated" wetland acres.

In 2006, in *Rapanos*, the Supreme Court issued a fractured (4-1-4) decision involving wetlands adjacent to non-navigable tributaries of traditional navigable waters. Importantly, the Court issued five opinions, none of which garnered a majority. **Recognizing the confusion wrought by their fractured decision, three of the various opinions urged the agencies to initiate a rulemaking clarifying the "waters of the U.S". While the federal courts await a revised waters of the U.S. rule, federal court litigation on "Waters of the U.S" mounts in the wake of *Rapanos*, leading to costly litigation, uncertainty, delay, and hampered Clean Water Act enforcement.**

In 2007, the Corps and the EPA issued its *Rapanos* Guidance, again ***without advance notice and public comment.*** The agencies amended this guidance in December 2008. **This guidance imposes a confusing and burdensome case-by-case jurisdictional requirement on most wetlands and streams. The 2008 guidance is contrary to sound science and creates an unworkable, time-consuming, expensive process that unnecessarily burdens decision makers and applicants.**

From 2002 through 2010, bills languished in Congress that would have amended the Clean Water Act to clarify the Act's jurisdiction over the Waters of the United States. The Clean Water Restoration Act (CWRA) would have restored the historical scope of the Clean Water Act to those waters protected by the Act prior to the 2001 SWANCC decision, but would not have expanded the scope of jurisdiction beyond those covered at that time.

3. **At stake in this rulemaking are millions of stream miles and wetland acres, drinking water supplies for 117 million Americans, healthy waters to support a healthy economy, and the effectiveness of the Clean Water Act itself.**

The 2003 *SWANCC* Guidance and the 2008 *Rapanos* Guidance have placed millions of wetland acres and tens of thousands of stream miles at risk of pollution and destruction. Given the interrelationship between waters, the existing Guidance has put all of the Nation's waters at risk by retreating from the comprehensive protections needed to achieve the Act's goals. The resources most at risk of losing the Act's protections as a result of the existing guidance are intermittent and ephemeral streams, many wetlands adjacent to such streams and other tributaries, and wetlands and other so-called "isolated" waterbodies that are not adjacent to tributaries.

EPA has estimated that intermittent or ephemeral streams comprise fifty-nine percent of all streams miles in the United States, excluding Alaska.[5] In the arid west, as much as ninety-six

[5] Letter from Benjamin H. Grumbles, Assistant Administrator, U.S. Environmental Protection Agency to Jeanne Christie, Executive Director, Association of State Wetland Managers (Jan. 9, 2006) [mistakenly date stamped Jan. 9, 2005] at 2.

percent of all stream miles in some states are intermittent or ephemeral.[6] These headwater, intermittent, and ephemeral waters feed the public drinking water supplies of an estimated 117 million Americans.[7]

Moreover, twenty million acres of wetlands in the lower forty-eight states are considered "isolated."[8] Many more acres are adjacent to small streams that are not navigable, and therefore at risk. According to the most recent national wetlands status and trends report, since 2004 the rate of wetland loss has increased by 140% over the previous report period. This is the first acceleration of wetland loss over a 50-year period, and the first since the passage of the 1972 Clean Water Act. This is the first study period occurring entirely post-*SWANCC*, and the U.S. Fish and Wildlife Service notes that the acceleration of wetland loss is likely at least partially explained by the jurisdictional confusion and the withdrawal of CWA protections by the agencies in the wake of the *SWANCC* and *Rapanos* cases.[9]

Science has demonstrated that these waters that are losing protection are some of the most important waters to maintaining the integrity and health of larger waters and the aquatic ecosystem as a whole. If they are polluted, degraded or destroyed, the health of wildlife and people that depend on these resources will suffer. Wetlands also help combat global warming and their preservation as habitat, sources for water storage, flood control and the like will be vital to the ability of wildlife to adapt to the challenges of a warming planet.[10]

On a practical level, the 2008 Guidance has resulted in delays, confusion and uncertainty for applicants seeking permits along with increased workloads for Corps and EPA officials. EPA's costs to enforce CWA 402, 404, and 311 have increased significantly due to the incremental resources required to assert jurisdiction post *SWANCC* and *Rapanos*.[11] Because it can be difficult to establish where the CWA applies after the Supreme Court's

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[6] *See, e.g.*, Letter from Stephen A. Owens, Director, Arizona Department of Environmental to Benjamin H. Grumbles, Assistant Administrator, Office of Water, U.S. Environmental Protection Agency (December 5, 2007) at 2 (describing the quality and function of surface waters in Arizona) (submitted as comments on the Guidance).

[7] U.S. Envtl. Protection Agency, Geographic Information Systems Analysis of Surface Drinking Water Provided By Intermittent, Ephemeral, and Headwater Streams in the U.S (State-by-State) and (County-by-County), http://water.epa.gov/lawsregs/guidance/wetlands/surface_drinking_water_index.cfm (last visited 7/19/11).

[8] *See* Pianin, Eric, *Administration Establishes New Wetlands Guidelines: 20 Million Acres Could Lose Protected Status, Groups Say*, WASHINGTON POST, pg. A5 (Jan. 11, 2003) (in discussing the 2003 agency guidance concerning *SWANCC* and so-called isolated wetlands, it states, "The new [guidance] would shift responsibility from the federal government to the states for protecting as much as 20 percent of the 100 million acres of wetlands in the Lower 48 states, according to official estimates.").

[9] DAHL, T.E. 2011. Status and trends of wetlands in the conterminous United States 2004 to 2009, at 16 U.S. Department of the Interior; Fish and Wildlife Service, Washington, D.C. 108 pp.

[10] *See, e.g.*, EPA National Water Program Strategy 2012: Response to Climate Change (Goal 6) http://water.epa.gov/scitech/climatechange/upload/epa_2012_climate_water_strategy_full_report_final.pdf.

[11] *See* 2014 EPA Economic Analysis at 30-31, at: http://www2.epa.gov/sites/production/files/2014-03/documents/wus_proposed_rule_economic_analysis.pdf.

decisions in *SWANCC* and *Rapanos*, enforcement efforts have shifted away from small streams high in the watershed where jurisdiction is a potential issue. **Post-*Rapanos* uncertainty and added time and expense is undermining Clean Water Act enforcement and the overall effectiveness of the Clean Water Act in maintaining and restoring the nation's waters.**

4. **The clean water rule is the product of four years of rigorous and transparent scientific and public policy deliberation and offers the best chance in a generation to clarify the "Waters of the United States."**

In the face of congressional inaction, in 2011, EPA and the Corps formally launched an administrative effort to clarify the "waters of the U.S." **The 2011 Proposed Guidance was the subject of extensive interagency review, economic analysis, and public notice and comment. Approximately 250,000 comments were submitted on the guidance, and these overwhelmingly supported the revised guidance.**

In 2011-2012, on a parallel track, the EPA Office of Research and Development compiled a draft science report, *The Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Connectivity Report).[12] This scientific report, based on peer-reviewed literature and an additional review by independent scientists, was prepared to inform the Administration's proposed rule clarifying which waters are protected under the Clean Water Act.

In July 2013, the EPA Science Advisory Board (SAB) launched an SAB Expert Scientific Peer Review of the Connectivity Report.[13] In September 2013, the agencies released the Draft Connectivity of Streams and Wetlands Science Report for public comment. Also in September 2013, after holding up action on the Clean Water guidance in the Office of Management (OMB) for almost two years, the Administration sent its draft proposed Clean Water Rule to OMB for interagency review.

In March 25, 2014, after months of interagency review, the EPA and the Army Corps of Engineers jointly proposed the formal rule clarifying and partially restoring the historic scope of waters protected under the Clean Water Act. The 2-page proposed rule text in the federal register is thoroughly explained and supported by a lengthy preamble, including both scientific and legal appendices, the publicly available Connectivity Science Report, and a thorough Economic Analysis. **The 200-day public comment period ended November 14, 2014.[14] Americans submitted over 1 million comments on the proposed rulemaking, and these comments were overwhelmingly in support of the rulemaking.**

In late September-early October 2014, the SAB issued reports affirming the scientific basis for the proposed rule (SAB Rule Letter) [15] and affirming – with recommendations for enhancing –

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[12] *See* Draft Connectivity Report (September 2013) at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf.

[13] *See* SAB Peer Review process at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed%20Connectivity%20Report!OpenDocument&TableRow=2.1#2.

[14] *See* EPA Waters of the U.S. rulemaking process materials at: http://www2.epa.gov/uswaters.

[15] EPA SAB letter to Administrator McCarthy, *Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's Proposed Rule titled "Definition of Waters of the United States under the Clean Water Act"* (September 30, 2014)

the scientific accuracy of the Connectivity Report (SAB Connectivity Peer Review Letter).[16] The Connectivity Report was revised and strengthened in accordance with the SAB recommendations and was released in final form in January 2015.[17] **Both the SAB report and the Final Connectivity Report will inform the agencies' final "waters of the U.S." rule.**

Throughout 2014, EPA has held hundreds of stakeholder meetings, including repeated meetings with agricultural and municipal and other stakeholders seeking improved clarity in the rulemaking. The EPA and the Corps prepared thoughtful responses to clarifying questions about agricultural concerns raised in the letter from Senate Agriculture Committee Chair Debbie Stabenow and 13 other Senators. As EPA Administrator McCarthy has noted, this is a positive dialogue that will make the rule better while still allowing the proposal to move forward to provide solutions for the nation's pressing water problems. We applaud the agencies' efforts to reach out to landowners to improve the clarity of the final rule, clearly distinguishing between regulated tributaries on the one hand, and excluded ditches, gullies, and rills on the other.

This rigorous and transparent proposed rulemaking process offers the best opportunity in a generation to clarify which waters are – and are not – waters of the U.S. subject to the Clean Water Act in a manner that provides more clarity than ever before. This rulemaking is informed by over 30 years of agency field experience, by the most comprehensive synthesis of stream and wetland connectivity science ever compiled, and by well over one million public comments.

We urge members of Congress to respect this rigorous and transparent rulemaking process and allow the agencies to move without further delay to finalize a strong final rule, consistent with the rule's foundations in the connectivity science, the goals of the Clean Water Act, and the Kennedy significant nexus jurisdictional standard. Until that final rule is in place, the 2003 and 2008 guidance documents and the lack of a clear jurisdictional standard for judicial review continue to require cumbersome, confusing, and resource intensive case-specific jurisdictional determinations. And millions of stream miles and wetland acres, drinking water supplies for 117 million Americans, healthy waters to support a healthy economy, and the effectiveness of the Clean Water Act itself all remain at risk.

5. **For the first time, the proposed rule is expressly excluding many ditches and other water features from CWA jurisdiction.**

In the interest of increasing clarity and certainty about the scope of the Clean Water Act, we support the agencies' proposed list of waters to be explicitly excluded from jurisdiction by rule. We support the agencies' proposal to explicitly exclude erosional and artificial water features

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(SAB Rule Letter) at:
http://yosemite.epa.gov/sab/sabproduct.nsf/518D4909D94CB6E585257D6300767DD6/$File/EPA-SAB-14-007+unsigned.pdf

[16] EPA SAB letter to Administrator McCarthy, *SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (October 17, 2014) (SAB Connectivity Peer Review Letter) at:
http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

[17] *Final EPA Report: Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (January 2015) at:
http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=296414#Download

such as gullies, rills, non-wetland swales, small ornamental waters, water-filled depressions incidental to construction activity, among others. Expressly making these kinds of waters non-jurisdictional by rule should help convey clarity and address many of the concerns of important segments of the landowning public and, in particular, the farming and ranching communities. **The proposed rule goes further in excluding waters than previous regulatory guidance has gone as set forth in the Corps' 1986 preamble language at 51 Fed. Reg. 41206, 41217 (November 13, 1986) and the 1988 EPA preamble language at 53 Fed. Reg. 20764 (June 6, 1988).**

6. **Clarifying and restoring clean water act protections fosters strong local economies and millions of jobs.**

EPA's conservative economic analysis demonstrates that this rule clarifying and restoring clean water protections is good for the economy. "Overall, a comparison indicates that the benefits justify the costs of this proposed action."[18] EPA's estimated annual indirect benefits of $300.7 million to $497.6 million are based primarily on estimates of ecosystem services flowing from protected or mitigated aquatic resources as a result of this increased compliance, as well as government savings on enforcement expenses:

> Benefits that accrue from this action include the value of the many ecosystem services provided by the small streams, wetlands, and other open waters protected by the many CWA provisions that would apply to them. These waters **provide habitat and biodiversity, support recreational fishing and hunting, filter sediment and contaminants, reduce flooding, stabilize shorelines and prevent erosion, recharge ground water, and maintain biogeochemical cycling**. Other benefits include **government savings on enforcement expenses** through reduced need for costly jurisdictional determinations where jurisdiction has been unclear under the current interpretation of the existing regulation. **Business and government may also achieve savings from reduced uncertainty in where CWA jurisdiction applies**. *Id.* at 32. (Emphasis added).

The agencies' benefit estimates are solidly supported by other economic analyses. Costanza et al (2014) estimated that the value of ecosystem services for "inland wetlands" averaged $25,682/ha/yr. The value of the services provided by the navigable waters themselves (included within "rivers and lakes") averaged only $4,267/ha/yr.

Healthy wetlands and streams are economic engines for local recreation-based economies. Every year 47 million Americans head to the field to hunt or fish. For example, the American Sportfishing Association reports that **anglers generated more than $201 billion in total economic activity in 2011, supporting more than 1.5 million jobs**.[19] The U.S Fish and Wildlife Service estimated that duck hunting in 2006 had a positive economic impact of more than $2.3 billion, supporting more than 27,000 private sector jobs.[20]

In some rural, mountain communities, river recreation and related activities generate the largest share of the local economy. Indeed, throughout the headwaters states, river recreation,

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[18] Economic Analysis of Proposed Revised Definition of Waters of the United States (March 2014) at 32.

[19] American Sportfishing Association, *Sportfishing in America* (January 2013).

[20] Economic Impact of Waterfowl Hunting in the United States, Addendum to the 2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, November 2008. US Fish and Wildlife Service.

including boating, fishing and wildlife watching, represent billions of dollars in commerce.[21] **In the Colorado River Basin portion of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, 2.26 million people participated in water sports in 2011, spending $1.7 billion that generated $2.5 billion in total economic output.**[22]

Another indication of the economic implications of protecting the Nation's water resources is revealed in the example of the actions taken by New York City to initiate a $250 million program to acquire and protect up to 350,000 acres of wetlands and riparian lands in the Catskill Mountains to protect the quality of its water supply rather than constructing water treatment plants which could cost as much as $6-8 billion. (Dailey et al. 1999). In South Carolina, a study showed that without the wetland services provided by the Congaree Swamp, a $5 million wastewater treatment plant would be required (http://water.epa.gov/type/wetlands/people.cfm).

The algal blooms that cause health problems also come at high economic costs. **For example, Dodds et al (2009) estimated that the total annual cost of the eutrophication of U.S. freshwaters was $2.2 billion.** This estimate included recreational and angling costs, property values, drinking water treatment costs, and a conservative estimate of the costs of the loss of biodiversity. Polasky and Ren (2010) cited research that estimated that if two lakes (Big Sandy and Leech) in Minnesota had an increase in water clarity of three feet, lakefront property owners would realize a benefit of between $50 and $100 million.

By any measure, clarifying and restoring clean water protections for America's waters is a good investment for healthy communities and a healthy economy.

CONCLUSION

National Wildlife Federation strongly supports this historic "waters of the United States" rulemaking as necessary and the best chance in a generation to clarify which waters are – and are not – "waters of the United States" protected by the 1972 Clean Water Act. We urge Congress to respect the agencies rulemaking and allow them to finalize this much-needed rule without further delay. We look forward to a final rule in 2015 that will provide greater long-term certainty for landowners and advance our collective efforts to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Respectfully Submitted,

Jan Goldman-Carter
Senior Manager, Wetlands and Water Resources
National Wildlife Federation
1990 K St. NW Suite 430
Washington, DC 20006

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[21] Western Resource Advocates 2014 Rule Comments.

[22] SOUTHWICK ASSOC., ECONOMIC CONTRIBUTIONS OF OUTDOOR RECREATION ON THE COLORADO RIVER & ITS TRIBUTARIES (May 3, 2012) (Table E-3), *available at* http://protectflows.com/wp-content/uploads/2013/09/Colorado-River-Recreational-Economic-Impacts-Southwick-Associates-5-3-12_2.pdf.

Small Business Owners Favor Regulations to Protect Clean Water

RESULTS FROM A SCIENTIFIC NATIONAL PHONE POLL OF SMALL BUSINESS OWNERS

July 2014

Top Finding:

80% of small business owners favor federal rules for clean water to protect upstream headwaters as proposed in the Environmental Protection Agency's new Waters of the U.S. rule.

Poll report produced by:

AMERICAN SUSTAINABLE BUSINESS COUNCIL

1401 NEW YORK AVE. NW, SUITE 1225, WASHINGTON DC 20005 TEL: 202.595.9302 INFO@ASBCOUNCIL.ORG ASBCOUNCIL.ORG

NATIONAL POLL: Small Business Owners Favor Regulations to Protect Clean Water

Summary

Recent pollutant spills in the West Virginia's Elk River and the Dan River in North Carolina, as well as the ongoing drought in California, have brought the economic importance of water security to the forefront of policy discussions. The major policy debate on clean water currently focuses on clarifying that the proposed Waters of the U.S. rule from the Environmental Protection Agency (EPA) should apply to headwaters, streams and rivers that flow seasonally or after rain, and certain wetlands, all under the Clean Water Act. A new nationwide telephone poll of small business owners found strong support for the new EPA proposal among business owners of all political affiliations.

More broadly, the poll found that small business owners assign high importance to clean water for their own operations and believe that government regulations are needed to safeguard it.

The views of small business owners about government protections for clean water are significant because these business owners are essential employers in their communities and many are also producers of American-made goods.

For many business owners, a lack of clean water poses a real risk to their own operations, with two-thirds expressing concern that water pollution could hurt their business. More than seven in ten small business owners – including majorities of Democrats, Republicans and independents – believe clean water protections help spur economic growth, compared to only six percent who believe they are too burdensome.

Respondents to this statistically significant poll were predominately Republican, as are the majority of small business owners nationally. Among the owners surveyed, 43% self-identified as Republicans or independent-leaning Republicans, 28% as Democrats or independent-leaning Democrats, and 19% as independents. The nationwide live telephone survey of small business owners (with 2 to 99 employees) was conducted by Lake Research Partners, June 4-10, 2014.

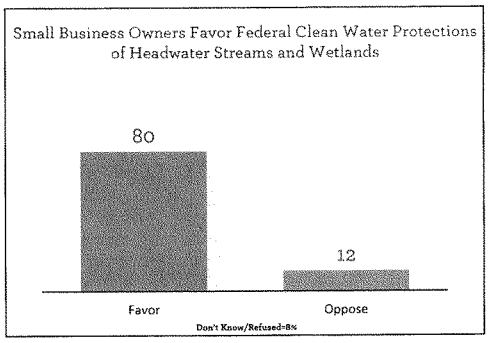
Key Findings

- 80% of small business owners favor federal rules to protect upstream headwaters and wetlands as proposed in the EPA's new Waters of the US rule.
- Support for clean water was broad and deep regardless of political affiliation. A plurality of small business owners are Republican, but in this case 78% of Republicans and 73% of independents, joined 91% of Democrats in supporting the clarifying of federal rules to apply to headland waters and wetlands.
- 71% of small business owners agree that clean water is necessary for jobs and a healthy economy.
- 67% are concerned that water pollution could hurt their business in the future.
- 62% agree that government regulation is needed to prevent water pollution.
- 61% believe that government safeguards for water are good for businesses and local communities. 60% believe that complying with clean water regulations is more economical than risking harm from neglecting safety practices.

Detailed Findings

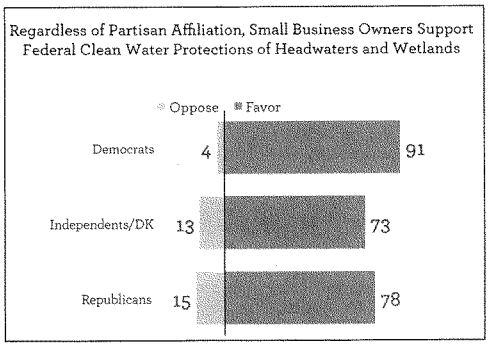
Small Business Owners Want Federal Protections to Include Headwater Streams and Wetlands

When told that a third of American waters, including those that flow into drinking water sources, are below quality standards due to upstream pollution, and that pollution-filtering, flood-preventing wetlands are also endangered, 80 percent of business owners said they agree federal rules protecting lakes and rivers should also protect headwater streams and wetlands. This question was designed to measure opinions about the intent of the Environmental Protection Agency (EPA) proposed rule called Waters of the U.S.



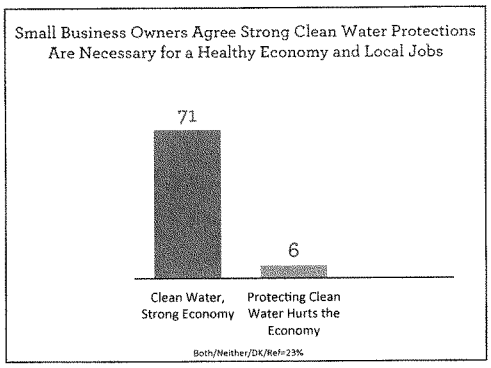
Small Business Owners of all Political Views Support Federal Protection of Headwater Streams and Wetlands

More than three-fourths of Republican small business owners – even more than independents – and almost all Democratic small business owners want federal clean water protections to cover headwater streams and wetlands as well as lakes and rivers.



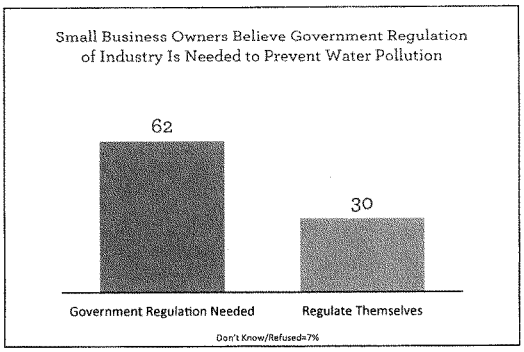
NATIONAL POLL: Small Business Owners Favor Regulations to Protect Clean Water

A Healthy Economy and Local Jobs Depend on Strong Regulations to Protect Clean Water



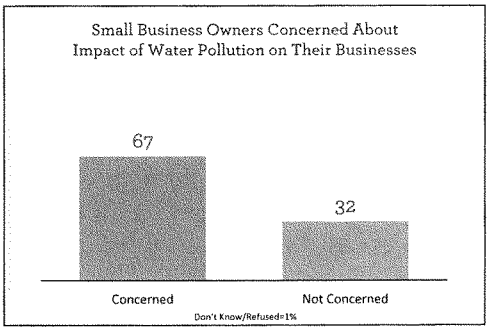
Government Regulation of Industry Is Necessary to Prevent Water Pollution

By a margin of more than 2 to 1, small business owners believe government regulation is needed to prevent water pollution. Fewer than a third of small business owners believe we should rely on industries to regulate themselves.



Small Business Owners Fear Effects of Water Pollution

When asked to think about the potential impact to their businesses from water pollution in the future, small business owners expressed concern by a margin of 2:1. Only one-third were not concerned.



Small Business Owners Get Specific about Government's Role in Protecting Water Supply

To ensure that all surveyed small business owners were responding to exactly the same arguments, they were read two arguments, pro and con, about the effect of the government's clean water regulations on businesses and the economy.

Pro-regulation: "Safeguards" Statement*

"Water contamination hurts businesses and the bottom line. Releases of chemicals into a local water supply can shut down all the businesses in a community, derailing operations and hurting businesses' reputations. Businesses that endanger local water supplies should be required to implement clean water safeguards and pay for cleanup costs, for the sake of all local businesses and community well-being."

Pro-regulation: "Costs" Statement*

"It may seem that a business can save money by neglecting safety practices that prevent water contamination. But spills and other industrial accidents happen, costing the businesses involved millions in lost revenues and liability, and disrupting the lives of customers and employees. On the whole, it is more economical to comply with regulations that prevent water contamination than to risk a catastrophic loss."

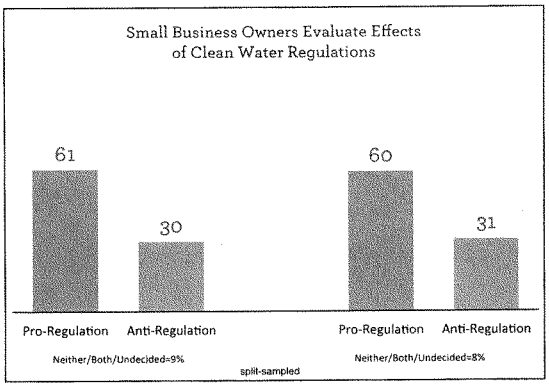
Anti-regulation Statement

"Overregulation by government agencies hurts businesses by forcing them to make costly, unnecessary changes to their business practices or else pay steep fines. Clean water regulations will drown businesses in bureaucratic rules that do not take small businesses into account and will unacceptably hurt the bottom line."

*Split sample

NATIONAL POLL: Small Business Owners Favor Regulations to Protect Clean Water

When asked to consider equally weighted arguments both for and against regulation, clear majorities of small business owners supported clean water regulations.



Like the American public in general, small business owners place a high value on clean water. For their businesses and the economy overall, they see clean water as key to success and they strongly support government efforts to protect it.

Methodology

Results for this scientific poll are based on a nationwide live telephone survey of 555 owners of for-profit small businesses in the U.S. with 2 to 99 employees, conducted by Lake Research Partners, June 4-10, 2014. The data were weighted slightly by gender, region, party identification, ethnicity and business size to match the sample of small business owners to the national population of small business owners. The survey's margin of error is +/-4.2%.

Toplines

1. Just to confirm, are you the owner of a "for-profit" business? (IF NO then terminate code 4; IF YES then continue.) And as owner do you handle the day-to-day business management and operations or not?

Yes	100%
No	0%

2. How many people are directly employed by your business, including yourself?

TERMINATE IF OVER 99 EMPLOYEES OR UNDER 2 EMPLOYEES

2-4 Employees	42
5-9 Employees	28
10-19 Employees	16
20-49 Employees	9
50-99 Employees	5

Now I'm going to read you some different environmental problems that some businesses are concerned about. For each one, speaking as a business owner, please tell me if you would be VERY concerned about the impact it could have on your business in the future, SOMEWHAT concerned, not too concerned, or not at all concerned about the impact it could have on your business in the future.

3. _water pollution

Very concerned	42
Somewhat concerned	25
Not too concerned	17
Not at all concerned	15
Don't Know/Refused	1
Concerned	67
Not concerned	32

And now thinking about these different issues, for each one, please tell me if you think we should rely on industries to regulate themselves, or if government regulation is needed.

4. _preventing water pollutionproductivity and customer satisfaction.

Regulate themselves	30
Government regulation needed	62
Don't Know/Refused	7

Water for drinking and commercial use in the U.S. is generally of high quality, but there have been instances recently where pipelines have burst and other disasters have contaminated an entire region's water supply.

5. Please tell me which of the following statements comes closer to your own views.

ROTATE STATEMENTS

_Strong clean water protections are necessary to maintain a healthy economy and create local jobs

OR

_Clean water regulations are too burdensome and are hurting the economy and local jobs

Clean water, strong economy	71
Protecting clean water hurts the economy	6
(Both)	11
(Neither)	6
(Don't Know/Undecided)	6
(Refused)	0

6. SSA: Next, I'd like to read you two different statements about the role of the GOVERNMENT in ensuring the cleanliness and safety of the water supply. Of the two, please tell me which statement is closer to your own views. ROTATE STATEMENTS

[Statement A: SAFEGUARDS] Water contamination hurts businesses and the bottom line. Releases of chemicals into a local water supply can shut down all the businesses in a community, derailing operations and hurting businesses' reputations. Businesses that endanger local water supplies should be required to implement clean water safeguards and pay for cleanup costs, for the sake of all local businesses and community well-being.

[Statement B: ANTI-REGULATION] Overregulation by government agencies hurts businesses by forcing them to make costly, unnecessary changes to their business practices or else pay steep fines. Clean water regulations will drown businesses in bureaucratic rules that do not take small businesses into account and will unacceptably hurt the bottom line.
[IF STATEMENT A OR B] Is that much closer or only somewhat closer to your view?

Pro-safeguards – much closer	35
Pro-safeguards – somewhat closer	26
Anti-regulation – somewhat closer	13
Anti-regulation – much closer	16
(Neither/Both/Undecided)	9
Pro-safeguards	61
Anti-regulation	30

7. SSB: Next, I'd like to read you two different statements about the role of the GOVERNMENT in ensuring the cleanliness and safety of the water supply. Of the two, please tell me which statement is closer to your own views. ROTATE STATEMENTS

[Statement A: PRO-REGULATION/COSTS] It may seem that a business can save money by neglecting safety practices that prevent water contamination. But spills and other industrial accidents happen, costing the businesses involved millions in lost revenues and liability, and disrupting the lives of customers and employees. On the whole, it is more economical to comply with regulations that prevent water contamination than to risk a catastrophic loss.

[Statement B: ANTI-REGULATION] Overregulation by government agencies hurts businesses by forcing them to make costly, unnecessary changes to their business practices or else pay steep fines. Clean water regulations will drown businesses in bureaucratic rules that do not take small businesses into account and will unacceptably hurt the bottom line.
[IF STATEMENT A OR B] Is that much closer or only somewhat closer to your view?

Pro-regulation – much closer	34
Pro-regulation – somewhat closer	27
Anti-regulation – somewhat closer	14
Anti-regulation – much closer	18
(Neither/Both/Undecided)	8
Pro-regulation	60
Anti-regulation	31

8. One third of the nation's waters do not now meet swimming and fishing water quality standards, due largely to upstream pollution in streams and wetlands. Would you favor or oppose ensuring that the federal rules that now protect our lakes and rivers also protect both the headwater streams that flow into our sources of drinking water, and the wetlands which filter pollution and prevent floods?

IF FAVOR/OPPOSE] And do you [favor/oppose] that proposal strongly or not so strongly?

Strongly Favor	45
Somewhat Favor	35
Somewhat Oppose	6
Strongly Oppose	6
(Don't Know)	8
(Refused)	0
Favor	80
Oppose	12

Finally, I would like to ask you a few questions for statistical purposes only.

9. Generally speaking, do you think of yourself as a Republican, a Democrat, an independent, or something else?

[IF REPUBLICAN OR DEMOCRAT:] Do you consider yourself a strong (Republican/Democrat) or a not-so-strong (Republican/Democrat)?

[IF INDEPENDENT:] Would you say that you lean more toward the Republicans or more toward the Democrats?

Strong Republican	16
Not-so-strong Republican	13
Independent - lean Republican	15
Republican	43
Independent	19
Democratic	28
Strong Democrat	11
Not-so-strong Democrat	9
Independent - lean Democrat	9
(Other)	3
(DO NOT READ, BUT RECORD VOL: Libertarian)	3
(Don't Know)	2

10. What is your age?
IF REFUSED: I am going to read you some categories. Stop me when we get to your category.

18-24 years	3
25-29	7
30-34	6
35-39	8
40-44	11
45-49	12
50-54	15
55-59	12
60-64	12
65-69	8
70-74	3
Over 75	1
Refused	0

11. Just to make sure we have a representative sample, could you please tell me whether you are from a Hispanic, Latino, or Spanish-speaking background?
[IF "NO", ASK:] What is your race--white, black, Asian, or something else?
DO NOT READ

White/Caucasian	81
Black/African American	6
Latino/Hispanic	5
Asian/Pacific Islander	5
Native American	1
Other	1
Don't know/Refused	1

Gender

Men	67
Woman	33

Minority owned flag on file

Yes	24
No	76

Region

New England	5
Mid-Atlantic	14
East North Central	15
West North Central	8
South Atlantic	19
East South Central	5
West South Central	11
Mountain	6
Pacific	16

Industry Code from File

Retail trade	16
Construction	15
Other services (except public administration)	13
Professional, scientific, and technical services	10
Arts, entertainment, and recreation	7
Real estate and rental and leasing	6
Health care and social assistance	5
Finance and insurance	5
Accommodation and food services	5
Manufacturing	5
Information	4
Agriculture, forestry, fishing and hunting	3
Wholesale trade	3
Educational services	2
Transportation and warehousing	2
Administrative and support and waste management and remediation services	1
Utilities	0
Mining, quarrying, and oil and gas extraction	0
Management of companies and enterprises	0
Public Administration	0
Industries not classified	0
No NAICS Provided	0